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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PERRY VON MURDOCK,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in contravention of this Court's precedent and in conflict with another Circuit Court of Appeals, the Tenth Circuit erred in holding that "Indian termination legislation," now largely repealed, may nevertheless be read to dismember an Indian tribe and deprive tribal descendants of ancestral treaty rights in violation of their rights of association and equal protection.

PARTIES TO THE PROCEEDING

Only those parties listed in the caption are parties to the proceeding.

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No. ———

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---

PETITION FOR A WRIT OF CERTIORARI

Perry Von Murdock (petitioner), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 132 F.3d 534 (10th Cir. 1997). The opinion of the district court (App., *infra*, 17a-37a) is reported at 919 F. Supp. 1534 (D. Utah 1996).

JURISDICTION

The court of appeals entered its judgment on October 20, 1997.[1] The court of appeals denied a timely petition

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[1] The court entered its opinion on October 20, 1997, issued a revised opinion on October 31, 1997. See *U.S. v. Murdock*, 128 F.3d 1343 (10th Cir. 1997). On December 22, 1997, the court denied

for rehearing on December 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ute Termination Act of 1954, 25 U.S.C. § 677, Purpose:

> The purpose of this Act [25 U.S.C.S. §§ 677 et seq.] is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property.

Petitioner's motion for rehearing, but issued a second revised opinion *nunc pro tunc* to October 20th.

Section 2 of the Ute Termination Act, 25 U.S.C. § 677a, provides in pertinent part:

> For the purposes of this Act—
>
> (a) "Tribe" means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.
>
> (b) "Full-blood" means a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice under the provisions of section 4 hereof.
>
> (c) "Mixed-blood" means a member of the tribe who does not possess sufficient Indian or Ute Indian blood to fall within the full-blood class as herein defined, and those who become mixed-bloods by choice under the provisions of section 4 hereof.

Section 5 of the Ute Termination Act, 25 U.S.C. § 677d, provides:

> Effective on the date of publication of the final rolls as provided in section 8 hereof the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this Act. New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder.

Article II, Section 1 of the Constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation, (1935)[2] provided:

---

[2] The entity now known as the Ute Tribe amended the membership provision in 1988. The amended version is not operative in this case, however, because it was not modified from the date of its origins in 1935 until twenty years after Perry Murdock's birth. The present version reads as follows:

ARTICLE II—Membership

Section 1. The membership of the Ute Indian Tribe of the Uintah and Ouray Reservation shall consist as follows:

(a) All persons of Indian Blood whose names appear on the official census roll of the Ute Indian Tribe of the Uintah and Ouray Reservation as of July 1, 1935.

(b) All children born to any member of the Ute Indian Tribe of the Uintah and Ouray Reservation who is a resident of the Reservation at the time of the Birth of said children.

STATEMENT OF THE CASE

This petition raises an issue of conflicting treatment between circuit courts of what is known as "Indian Termination" law, and its affect on the freedom of association of the American Indian tribe. The intent of termination was to end most aspects of the historic relationship between the federal government and the terminated tribes, and to transfer responsibility for those tribes to the states. Ultimately, Indian termination was rejected and abandoned amidst legislative and executive admissions that it was a misguided attempt to eradicate Indian cultures.[3] Nevertheless, it still deeply afflicts the lives of persons of Native American descent in the Tenth Circuit, where,

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ARTICLE II—MEMBERSHIP

SECTION 1. The membership of the Ute Indian Tribe of the Uintah and Ouray Reservation shall consist as follows.

(a) All persons whose names appear on the official tribal roll as of April 15, 1988.

(b) After April 15, 1988, members in the Ute Indian Tribe of the Uintah and Ouray Reservation shall be limited to those persons who possess at least five-eighs (5/8) degree Ute Indian blood derived from the blood quantum of Ute Indians whose names appear on the Full-Blood Roll of March 27, 1956, published April 5, 1956, in the *Federal Register* 2208 *et seq.*

[3] See text at 9-11.

unlike other circuits, the letter of the law is rigidly construed against these persons. The specter of termination will continue to generate conflicts among the courts, resulting in disparate treatment among tribal members, and haunt current federal policy in Indian affairs, until a pronouncement of this Court delineates what protections, if any, the First Amendment's associational rights afford to Indian tribes.

In *Menominee v. United States,* 391 U.S. 404, 413 (1968) this Court held that termination would not be construed as a backhanded way of abrogating the hunting and fishing rights of the Menominee Indians, implicitly recognizing the survival of the Menominee Tribe. Later opinions [4] agree that although the word termination tolls out finality, the termination statutes should be read to allow for the survival of tribalism and treaty rights. The Court of Appeals for the Ninth Circuit, the other jurisdiction where a significant number of terminated Indians still reside, followed *Menominee* and harmoniously held that although termination may sever all or part of the federal-tribal relationship, it does not literally bring an end to the existence of the tribe. "It did not affect the power of the tribe to take any action under its constitution and by-laws consistent with the [Termination] Act." *Kimball v. Callahan,* 590 F.2d 768, 776 (9th Cir. 1979) *cert. denied,* 444 U.S. 826 (1979).

In disregard of the instructions of *Menominee* and in conflict with the holding of the Ninth Circuit in *Kimball,* the Tenth Circuit has applied the word "termination" literally to mean extinction and finality. The result of this discordant application is that Petitioner, Perry Murdock,

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[4] In *Alabama-Coushatta Indian Tribe of Texas v. Manox,* 650 F. Supp. 282, 286 (W.D. Tex. 1986) the state of Texas conceded that termination did not terminate the Tribe's existence as a tribal government. The district court expressly incorporated that concession as part of its holding. *Id.* at 289.

the son of terminated Ute Indian parents, has no treaty rights, cannot claim tribal membership, and cannot even claim Indian ethnicity.[5]

Despite the fact that under the Act, Congress superseded the tribe's membership laws[6] and expelled its members, the Tenth Circuit found no constitutional infirmities in the Act. App., *infra*, 5a. It acceeded to the decision of the district court in this case, that Indian tribes do not qualify as intimate associations for the purpose of First Amendment freedoms. App., *infra*, 36a, n.21. Then the court side-stepped further commentary on the First Amendment issue by stating that Perry Murdock lacked standing to raise the tribe's right of association in his own defense. But the appellate court's evasion of the associational freedom issue is contrary to this Court's clear precedent in *Powers v. Ohio*, 499 U.S. 400 (1991), holding that a criminal defendant, like Perry Murdock, has standing to raise the constitutional rights of a third party, where his own conviction of a criminal offense hangs in the balance.

It is essential that the Court grant this writ to assure that the rights of Native Americans and their tribes be given the full protection mandated by *Menominee*, *Kimball*, and the First Amendment.

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[5] The issue before the district court was the government's Motion to Determine Defendant's Indian Status, which asked the district court to determine that "Defendant did not have lawful authority to hunt on the Indian tribal lands . . . because he is the child of mixed-blood Utes whose tribal membership and legal status as Indians was terminated in accordance with the Ute Termination Act, . . ." The district court granted the government's motion and the Tenth Circuit affirmed.

[6] The tribe's constitution guaranteed membership to all descendants of Ute tribal members. Perry's father was a charter member of the tribe that drafted that constituion in 1935, and his mother a member from her birth until termination.

LEGISLATIVE BACKGROUND

1. *The Policy of Termination.* After World War II, the United States government shifted from a policy of Indian Self-Determination, and reverted to an increased effort to "assimilate" tribal Indians into "mainstream" society. See F. Cohen, *Handbook on Federal Indian Law,* 152-180 (1982 ed.). "The most extreme extension of assimilation was the termination policy." C. Wilkinson & E. Biggs, *The Evaluation of the Termination Policy,* 5 Am. Indian L. Rev. 139, 140 (1977).

Termination was "initiated by the United States in the interests of the United States . . . the objective was to 'get out of the Indian business' . . . in a hurry." *Menominee Tribe of Indians v. United States,* 221 Ct. Cl. 506, 607 F.2d 1335 (1979), *cert. denied,* 445 U.S. 950 (1980). The termination statutes were enacted quickly with little study by Congress. Cohen, at 171-75. During the height of termination zeal, the Eighty-third Congress enacted several statutes, including the Ute Indian Termination Act (hereinafter the "Ute Termination Act" or the "Act"), 25 U.S.C. §§ 677-677aa (1954), which terminated the status of Indian Tribes as federally recognized, and eliminated most aspects of the special relationships between the tribes and the federal government. See *Bryan v. Itasca County, Minn.,* 426 U.S. 373, 387-88 (1976); *Affiliated Ute Citizens v. United States,* 406 U.S. 128, 133 n.1 (1972). Termination policy was designed to eliminate any special treatment for Indian tribes and to reduce federal involvement in Indian affairs by terminating federal supervision over the assets of Indian tribes, terminating the trust status of tribal lands and other assets, and dividing tribal assets among individual Indians and Indian tribes.

2. *The difficulties of Termination.* As early as 1958, however, the Interior Department questioned the wisdom of termination policy. Wilkinson & Biggs, at 163; see

Cohen at 180. Criticism of termination policy began to mount. *Cf. Bryan*, 426 U.S. at 133 n.1. Even Congress recognized that the policy was a "failure," as terminated Indians did not keep up economically with their federally recognized Indian neighbors and the surrounding non-Indian population. H.R. Rep. No. 1019, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S. Code Cong. Admin. News 757, 758; see *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); Wilkinson & Biggs, at 141, ("most observers have concluded that termination has failed").

During the administration of President Kennedy, Secretary of the Interior Stewart Udall commissioned a special task force in Indian Affairs. After five months, the task force issued its study, recommending the repeal of termination and the restoration of all terminated tribes. Task Force on Indian Affairs, Report to Secretary of the Interior (July 10, 1961); Cohen at 182. The administrations of Presidents Johnson and Nixon advanced the efforts of the Kennedy Administration. President Johnson called for "a new goal for our Indian programs: A goal that ends the old debate about 'termination' of Indian programs and stresses self determination;" Cohen at 184. President Nixon called for "rejection of termination because it ignored the moral and legal obligations involved in the special relationship[7] between tribes and the federal government." Cohen at 186. A Congressional study in the aftermath of termination, concluded that the termination acts probably could not withstand a judicial attack based on the Secretary's statutory noncompliance.

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[7] "To terminate this relationship," said the President, "would be no more appropriate than to terminate the citizenship rights of any other American." President Nixon's July 8, 1970 Message to Congress, H.R. Doc. No. 303, 91st Cong., 2d Sess. (1970).

I American Indian Policy Review Comm'n, Final Report, 453-54 (Comm. print 1977).[8]

3. *Judicial and Congressional Abandonment of Termination.* Beginning with the repeal of the Menominee Termination Act in 1968, and continuing through the repeal of the Catawba Termination Act in 1993, Congress and the federal courts [9] have repealed or overturned nearly all the terminations.[10] But the few that remain, all of

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[8] The report states, "It was the opinion of Reid Chambers, then the Associate Solicitor, Division of Indian Affairs, that such suits 'will almost surely succeed.'" The Senate Select Committee on Indian Affairs reached the same conclusion. American Indian Policy Review Comm'n, Report of Task Force on Terminated and Non-Federally Recognized Indians. 452 (Comm. Print 1976).

[9] The federal district courts in the Ninth Circuit overturned the terminations of twenty-seven of the California Rancherias because of the failure of the Secretary of the Interior to execute his prerequisite duties to termination in good faith. *Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Cal. 1977); *Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255 (N.D. Cal. 1981); *Smith v. United States*, 515 F. Supp. 56 (N.D. Cal. 1978); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973); *Kelley v. United States Department of the Interior*, 339 F. Supp. 1095 (E.D. Cal. 1972); and several other unreported cases.

[10] Menominee Tribe of Wisconsin, Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) (formerly codified at 25 U.S.C. §§ 891-902 (1970)); Southern Paiutes of Utah, Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (repealed 1980) (formerly codified at 25 U.S.C. §§ 741-760); Alabama and Coushatta Indians of Texas, Act of August 23, 1954, ch. 831, 68 Stat. 768 (repealed 1982) (formerly codified at 25 U.S.C. §§ 721-728); Western Oregon Tribes, Act of Aug. 13, 1954, ch. 733, 68 Stat. 724 (repealed 1977 with respect to Siletz Tribe; 1983 as to the Grand Ronde Tribe; 1984 as to the Coos, Lower Umpqua, and Siuslaw; 1987 as to the Cow Creek Band; 1989 as to the Coquille Tribe) (codified as amended at 25 U.S.C. §§ 691-708); Klamath Tribe of Oregon, Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (repealed 1986) (formerly codified at 25 U.S.C. §§ 564-564x); Mixed-blood Utes of the Uintah and Ouray Reservation in Utah, Act of Aug. 27, 1954, ch. 1009, 68 Stat. 868 (codified as amended at 25 U.S.C. §§ 677-677aa); Lower Lake Rancheria, Act of Mar. 29, 1956, ch. 100, 70 Stat. 58 (affecting only two Indians and two acres of land. See Wilkinson & Biggs, *The Evolution of Termi-*

which are based in the Ninth and Tenth Circuits, present terrible dilemmas demographically, geographically, culturally, and along other axes of societal destruction. While many injustices have been remedied, many still persist.

Even before the repeals, this Court, and many of the lower federal courts, softened the blow of termination, with holdings that the terminations could not be construed as a termination of Indian status, the end of the existence of the tribe, or the subjugation of treaty rights. *Menominee v. United States*, 391 U.S. 404, 412 (1968); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974) (*Kimball I*); and *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979) (*Kimball II*). This Court also endorsed a retreat from the furtherance of Termination Policy, stating in *Brian v. Itasca County*, 426 U.S. 373, 389 n. 14, (1976), that "[Courts] are not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected."

The repeal of the termination acts and the response of most of the federal courts toward a new federal Indian

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nation Policy, 5 Am. Ind. L. Rev., p. 91 (1977)); Coyote Valley Rancherias, Act of July 10, 1957, Pub. L. No. 85-91, 71 Stat. 283 (never completed, See *Coyote Valley Band of Pomo Indians v. United States*, 639 F. Supp. 165 (E.D. Cal. 1986)); California Rancherias, Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619, as amended by Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390 (see discussion at footnote 9 concerning the overturn of the California Rancheria Act as to all but a few of the rancherias); Peoria, Act of Aug. 2, 1956, ch. 881, 70 Stat. 937 (repealed 1978) (formerly codified at 25 U.S.C. 821-826 (1976); Ottawa, Act of Aug. 3, 1956, ch. 909, 70 Stat. 963 (repealed 1978) (formerly codified at 25 U.S.C. §§ 841-853 (1976)); Wyandotte, Act of Aug. 1, 1956, ch. 843, 70 Stat. 893 (repealed 1978) (formerly codified at 25 U.S.C. §§ 791-807 (1976)); Catawbas, Act of Sept. 21, 1959, Pub. L. No. 86-322, 73 Stat. 592 (repealed 1993) (formerly codified at 25 U.S.C. §§ 931-938); Poncas, Act of Sept. 5, 1962, Pub. L. No. 87-629, 76 Stat. 429 (repealed 1990) (codified at 25 U.S.C. §§ 971-980).

policy "mirrored the growing national awareness of the plight of ethnic minorities," and public support for permitting Indians "to retain traditional values while adjusting to modern American life." Cohen, p. 181.

Nonetheless, against the backdrop of this Court's landmark decisions in *Brown v. The Board of Education*, 347 U.S. 483 (1954), and *Bolling v. Sharpe*, 347 U.S. 497 (1954), Congress defined each member of the Ute Indian Tribe on account of his or her race, and divided the Tribe into two races. Upon publication of the names of those who fit into the two racial classes in the *Federal Register*, the lesser class, consisting of 27% of the Ute Tribe, would be banished henceforth and forever from membership in their tribe. As of April 5, 1956, the roll published in the *Federal Register*, would then redefine the Ute Tribe's membership. The Act exiled former members from their race, their culture and heritage, and according to the appellate court in this case, it banished them from their legacy of tribal citizenship and from their treaty birthrights.

4. *Formation and Termination of the Ute Indian Tribe.* By Executive Order, President Abraham Lincoln established Uintah Valley Reservation, on October 3, 1861. Congressional ratification of the Executive Order in 1864 (Act of May 5, 1864 ch. 77, 13 Stat. 63) recognized the exclusive rights of the Uintah Indians, to hunt and fish on the reservation lands. *United States v. Felter*, 546 F. Supp. 1002, 1010-13 (D. Utah C.D. 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985). The Band of Uintah Ute Indians was composed of those Indians compelled, by white settlement, to remove from the Great Salt Lake and Utah Lake regions of Utah. *Uintah Ute Indians of Utah v. United States*, Indian Cl. Comm. Docket 44 (1957).

In Colorado, the Whiteriver Utes and the Uncompahgre Utes faced similar encroachments upon their lands. By a treaty of 1868, these two bands were guaranteed reserva-

tions in the western part of Colorado, but the expanding mining frontier further encroached upon the reservation lands, leading to a huge cession of those lands in 1873, and ultimately to pitched battles. In order to quell the public outcry among whites for extermination of the Colorado Utes, an agreement was signed in Washington, D.C., March 6, 1880, that provided for the removal of the White River Utes to the Uintah Valley Reservation and removal of the Uncompahgre Utes to lands adjacent to the Uintah Reservation.

In accordance with the Indian Reorganization Act[11] the three bands of Ute Indians adopted the Constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation. Colin Murdock, father of Perry Murdock, as a seven-year-old member of the Uintah Ute Band, became a charter member of the newly formed tribe when the Ute Indian Tribe adopted its constitution in 1935. The constitution preserved the identities of the three separate bands. It provided for a business committee, consisting of six members, with two members selected from each of the three bands. App., *infra*, 57a. All actions of the business committee are "subject to review by the Ute Bands themselves at any annual or special meeting." App., *infra*, 59(a).

Article II of that Constitution provided that any child born to a member of the tribe, residing on the reservation at the time of the birth, would automatically become a member of the tribe. Two years later, Collin's bride-to-be, Laura June Hackford, was born into membership of the Ute Indian Tribe under the Article II provisions. Both Colin and June remained members of the tribe until 1956, when Congress usurped the Tribe's authority to define tribal membership, set aside the membership under the tribe's constitution, and redefined Ute Tribal membership

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[11] Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-70, 471-73, 474, 475, 476-78, 479 (1997)).

in accordance with the criteria of the Ute Termination Act.

5. *Treaty Rights on the Uintah Reservation.* The right to hunt and fish on the Uintah Valley Reservation belonged exclusively to the Uintah Band at the time the reservation was created. App., *infra*, 28a-30a. Under the terms of the tribe's constitution, the rights and powers of the tribe or the respective bands would be exercised "by the people of the Uintah and Ouray Reservation." Neither the Ute Termination Act, nor the Indian Reorganization Act made any mention of the treaty rights.

6. *The Facts in This Matter.* On October 3rd, 1993, Perry Von Murdock, son of Colin and June Murdock, set out to test whether Native Americans enjoy the same First Amendment protections as other Americans to be protected from congressional intervention into the memberships of their intimate and expressive associations; in this case, the Indian tribe. He did so in the same manner as his predecessors in the great causes of civil rights have done: by civil disobedience to an unjust law. He went hunting on his ancestral treaty lands.

Perry's test to see if his treaty rights survived the termination followed two other successful test cases in the preceding year. Jody Lopez and Johnny Lee Reber both received similar trespass citations alleging violations of 18 U.S.C. § 1165. Jody and Johnny were also Uintah descendents whose parents were terminated. Jody and Johnny were born before termination, but the Secretary of the Interior neglected to include them, and many others, when he made up his termination rolls. They were never listed with the Utes to be terminated, nor were they listed with the Utes to remain in the tribe. Left in limbo, Jody and Johnny assumed they still had treaty rights. These two admitted to the Federal Magistrate that they were hunting on Indian lands, but they argued they were treaty heirs in spite of their ambivalent tribal status. The Fed-

eral Magistrate agreed. (Applt. Appendix at 16-20, *U.S. v. Murdock*, 132 F.3d 534 (10th Cir. 1997)).

Bolstered by these two cases, buttressed by this Court's pronouncement in *Menominee*, that termination would not be construed as a backhanded abrogation of treaty, hunting and fishing rights, and backed by the Ninth Circuit's *Kimball* decisions that said children of terminated Indians retained their treaty rights. Perry Murdock went hunting.

Perry got a nice five point elk, which, to his dismay, rotted away in the back of a fish and game officer's truck after the officer took the elk in exchange for the citation he gave Perry to institute this action. On September 6, 1994, Perry was arraigned in the district court for one count of misdemeanor trespass in violation of 18 U.S.C. § 1165.

In response to his defenses, the United States filed a Motion to Determine Defendant's Indian Status, asking the court to find that his parents' "tribal membership and legal status as Indians was terminated in accordance with the Ute Termination Act," and further, that Perry Murdock was also not an Indian or a member of the Ute Tribe. On March 19, 1996, the district court granted the government's motion. App., *infra*, 36a-37a. On August 21, 1996, Perry entered a plea of nono contendere, reserving the right to appeal the court's decision of March 19, 1996. With the court's permission, Perry augmented the record to show that in 1979 he had made application for membership in the Ute Tribe. App., *infra*, 67a-69a. This was done to clear up assumptions to the contrary that were stated in the district court's opinion. The court accepted Perry's conditional plea, sentenced him, and stayed imposition pending appeal.

7. *Decision Below.* The Tenth Circuit has decided an issue of critical importance, not only to the victims of the Ute Termination Act, but to Indian Tribes nationally, in a manner that disregards the teachings from this Court in

its decision in *Monominee*, and conflicts with the Ninth Circuit's holding in *Kimball*. Both of these cases decided that termination ended neither tribal existence, tribal membership, nor the treaty rights of terminated tribal members. The consonance of these two decisions is starkly contrasted by the Tenth Circuit's holding that the Ute Termination resulted in the literal expulsion of Perry Murdock's parents from their tribe, along with 488 other tribal members. App., *infra*, 12a. The membership of the tribe, as defined by the tribe's constitution, drafted in 1935, was supplanted by the roll published in the *Federal Register*, of the tribal membership as defined by Congress. App., *infra*, 41a. The crux of the Tenth Circuit's holding, is that "the UTA [Ute Termination Act] specifically declared an end to tribal membership of mixed-bloods once they received their share of the tribal assets." App., *infra*, 12a. The court then emphasized "the right of the Tribe to *thereafter* determine new members." App., *infra*, 12a. (emphasis in the original).

Remarkably, the court pays lip service to the passage, "'A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, n. 32 (1978)). App., *infra*, 12a. However the effect of the Tenth Circuit's ruling was to excuse Congress' violation of that right when it supplanted the Tribe's membership criteria with the membership criteria in the Ute Termination Act. The court then adds, "[w]e are not at liberty to define tribal membership in a manner at odds with the Tribe's exercise of its sovereign right to do so," but does not explain why it finds that Congress was at liberty to do so.

The appellate court avoids any analytical discussion of the fundamental issue of the associational rights of the tribe. The court confines its comments to its initial statement that, "the Act, though perhaps open to criticism, is not unconstitutional," App., *infra*, 5a, and to its later

statement "to the extent that Mr. Murdock is asserting an infringement of the Tribe's [freedom of association] rights, he has no standing to do so." App., *infra*, 16a. This, in spite of the fact that Perry Murdock is a criminal defendant, and his guilt or innocence turns on the constitutionality of the act he challenges. See *Powers v. Ohio*, 499 U.S. 400 (1991). The court's commentary ends short of clarifying whether it is holding that an Indian tribe is not an expressive or an intimate association, or whether Indian tribes are simply not protected under the First Amendment. But its *carte blanche* affirmance of the district court's holding, that "the tribe does not meet the level of an intimate association under *Roberts*,"[12] means that holding will stand as the law of the land concerning tribal associational rights unless review is granted by this Court.

The Tenth Circuit's conflict with the outcomes in *Menominee* and *Kimball* also poses equal protection issues. The divestiture of one's ethnic heritage by Congressional fiat, found in the district court's grant of the government's Motion to Determine Defendant's Indian Status, is certainly unprecedented. App., *infra*, 36a. The appellate court affirmed the district court, and glossed over the additional equal protection concern that stems from the fact that the very intent of the law was to define a "discrete insular minority" and to cause that race or type "to wither and disappear." See *United States v. Carolina Products*, 304 U.S. 144, 153, (1938), and *Skinner v. Oklahoma*, 316 U.S. 535 (1952). Adding a new twist to *United States v. Antelope*, 430 U.S. 641 (1977), the Tenth Circuit ruled that although Congress divided the members of the tribe into two racial classes, it was still dealing with the tribe as a tribe, and thus there was no denial of equal protection. App., *infra*, 15a.

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[12] By implication, the court also rejected the argument that the tribe is an expressive association.

WHY THE WRIT SHOULD BE GRANTED

1. *The Decision Below Disregards* Menominee *and Conflicts with the Ninth Circuit's Holding in* Kimball.

Menominee v. United States, 391 U.S. 404 (1968) addressed the impact of the Menominee Termination Act on tribal hunting and fishing rights established by treaty. The Court held, "We decline to construe the Termination Act as a backhanded way of abrogating treaty rights of these Indians." The litigation necessarily invoked the issue of whether the Menominee Tribe survived termination, and whether, therefore, any tribe existed to claim the special treaty rights. The opinion of the Court of Claims, held that, 'The Menominee Termination Act did not abolish the tribe, or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the tribe." *Menominee Tribe of Indians* v. *United States*, 388 F.2d 998, 1000 (Ct.Cl. 1967). That holding was integral to the decision because the Government had challenged the Court of Claims' jurisdiction on the premise that the Menominee Termination Act abolished the Menominee Tribe and the plaintiffs could not maintain a suit. *Id.* at 1000.

In affirming the decision, this Court did not expressly rule on the issue of tribal existence, but the continued existence was necessarily implied in the Court's decision that termination did not divest the affected Indians of their treaty rights.[13] The Court's analysis is harmonious with the views universally expressed by legal scholars on termination. "Congress can terminate only the federal-tribal relationship, not the tribe itself. Wilkinson, Charles F. & Eric R. Biggs, *The Evolution of Termination Policy*, 5 American Indian Law Review, 139 (1977). "An Indian

[13] The issue was raised on appeal by the State of Wisconsin, appearing as amicus curiae. The state contended vigorously that the Menominee Tribe had literally been "terminated" and ceased to exist. (Reply Brief and Appendix of the State of Wisconsin, Amicus Curiae on Re-argument at 2-5, *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

whose tribe has been terminated will not be considered an Indian for most federal purposes. Nevertheless, such a person remains an Indian ethnologically and continues to be a tribal member for internal tribal purposes." F. Cohen, Handbook on Federal Indian Law 26-27 (1982 ed.)

In accordance with this Court's decision in *Menominee*, The Court of Appeals for the Ninth Circuit reached the same result with respect to the Klamath Termination, a termination even more closely related to the Ute Termination Act. The Klamath Termination Act, Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (repealed 1986) (formerly codified at 25 U.S.C. §§ 564-564x), permitted some members of the Klamath Tribe to "withdraw" from membership in the tribe in order to receive their share of tribal assets. The act provided that "[m]embers of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe. . . ." 25 U.S.C. § 564e(c).

The plaintiffs were five Klamath Indians who had received their share of tribal assets. Under the plain language of the Act, it would appear they ceased to be members of the tribe. These five brought suit to enforce their treaty rights. The defendants argued that § 564m(b) of the Act, that preserved fishing rights to the Klamaths, applied only to " 'the tribe or the members thereof' and plaintiffs are no longer 'members' of the tribe." *Kimball v. Callahan*, 493 F.2d 564, 569 (9th Cir.) (*Kimball I*). Relying on *Menominee*, the Ninth Circuit said the purpose of the Termination Act "is only to terminate federal *supervision* over tribal property and its members." *Id.* at 568 (emphasis in the original). The court rejected the argument that terminated Klamaths lost their tribal membership, "[o]therwise, the Act would in fact have resulted in the abrogation of treaty rights." *Id.* at 569.

Following remand, a supplemental complaint asserted, *inter alia*, the right of the descendants of the Terminated

Klamaths to exercise the treaty rights. In clarifying its prior holding, the court said:

> Prior to the Termination Act, the Klamath Tribe held treaty hunting, fishing, and trapping rights within its reservation in which the individual members of the Tribe held rights of user. The Termination Act did not affect those rights. *That an individual member withdrew from the Tribe for purposes of the Termination Act did not change his relationship with the Tribe as to matters unaffected by the Act, e.g., treaty hunting, fishing, and trapping rights.*

Kimball v. Callahan, 590 F.2d 768, 773 (9th Cir.) (*Kimball II*) (emphasis added). The defendants again challenged that the tribal rolls were closed by the Termination Act on August 13, 1954, and that 25 U.S.C. § 564b "expressly provided that children not alive on that date could not subsequently be included on that roll." *Id.* at 775. The Ninth Circuit proceeded:

> Appellants' argument is based upon the premise that the tribal roll provided for by the Termination Act was final for purposes of determining who could exercise tribal treaty rights. We reject that premise.

Id. at 775. The court concluded that, "the treaty hunting, fishing and trapping rights survived the Klamath Termination Act for all members on the final tribal roll and their descendants." *Id.* at 777-78.

It is on this precise point that the Tenth Circuit parts company with this Court and the Ninth Circuit. The Tenth Circuit has chosen to apply the word "termination" literally to spell out extinction and finality with regard to treaty rights as well as federal supervision. The Ninth Circuit has not. In rejecting Perry Murdock's argument that his parent's tribal membership was unaffected for purposes other than federal supervision, the Tenth Circuit adopts the position that Congress' plenary powers over Indian Affairs superseded the right of the Ute Indian Tribe

to define its own membership. The tribe's right to delineate its own membership under its own constitution of 1935 was toppled by Congress, when on April 5, 1956, the *Federal Register* published the list of names that redefined Ute Tribal Membership in accordance with Congress' mandate. The Tenth Circuit's conclusion that Perry's parents are not members of the Ute Tribe, means that the Ute Termination Act dismembered the Ute Tribe, expelling twenty-seven percent of its citizenry, destroying not only their tribalism, but also their treaty rights.

The Ute Tribe died that day. It is survived by an entity that bears the name of the tribe, but whose membership is no longer decided under the criteria set by the Indians who organized their tribe in 1935. Rather, its membership is delimited by the Congress of the United States. In a sense, every other Indian tribe throughout this nation died that day as well, because their sovereignty to designate their own membership teeters precariously at the sufferance of prevailing Congressional winds, which do not always blow in the Indians' favor. They have no rights to be secure in their freedom of association, as well as in other First Amendment rights, unless the Ute Termination Act is unconstitutional.

The Tenth Circuit held that the Ute Termination Act is not unconstitutional. App., *infra,* 5a, and assented to the holding of the district court, that an Indian tribe is not an intimate association for purposes of the First Amendment. App., *infra,* 36a, n. 21. Then the Tenth Circuit attempted to avoid Petitioner's constitutional claims with standing analysis. The court said, "to the extent that Mr. Murdock is asserting an infringement of the tribe's [associational] rights, he has no standing to do so." But in *Powers v. Ohio,* 499 U.S. 400 (1991), this Court held that a criminal defendant may raise the constitutional rights of third parties in his or her own defense under certain circumstances. Those circumstances apply in this case. The

Court outlined a three step analysis to determine when a defendant charged with a crime can assert the rights of a third party:

> The litigant "must have suffered an 'injury in fact' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute, . . . the litigant must have a close relationship with the third party, . . . and there must exist some hinderance to the third party's ability to protect his or her own interests.

499 U.S., at 411.

Clearly, Perry Murdock has suffered an injury in fact. As the natural child of a charter member of the Ute Tribe, Perry Murdock is a member of the Ute Tribe, certified as such by membership criteria of the Tribe's Constitution, unless the tribe's membership criteria are those established by the Act he seeks to challenge. As a member of the tribe, he is not chargeable in Federal Court with the offense to which he stands convicted under 18 U.S.C. § 1165, which applies only to non-Indians. See *U.S. v. Jackson*, 600 F.2d 1505 (9th Cir. 1985).

Perry also clearly meets the second step in the analysis. He has a close relation to the third party, in this case the tribe, because it is his tribe. The Termination is the only barrier between him and full citizenship.

The third step is met just as clearly. An enormous hinderance exists to the third party's ability to protect its own interest: The tribe whose right of association was violated, is the Ute Tribe that established itself in 1935, but it is no longer recognized. Its very ability to prove its existence in order to challenge the termination, turns upon the arduous process of proving the termination did not end its tribal existence. That is why we are here.

2. *Failure to Adhere to the Teachings of* Menominee *and* Kimball *Results in an Unconstitutional Deprivation of the Freedom of Association, an Unconstitutional Classification Along Racial Lines, and an Improper Loss of Treaty Rights.*

a. The Tenth Circuit's unwillingness to accede to the wisdom shown in *Menominee, Kimball I* and *Kimball II*, necessitates a First Amendment scrutiny of whether Congress can extinguish a tribe or its membership for purposes other than federal supervision and recognition. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court defined two distinct classes of association: "intimate" and "expressive," that "must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." Expressive associations facilitate the exercise of other constitutionally protected activities, such as "speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618; *accord, Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, at 544 (1987). The characteristics of an expressive association fits the Indian tribe like a buckskin glove.

The primary purposes of protecting the expressive association are to preserve "political and cultural diversity" and to protect "dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622. The express purpose of termination, to "assimilate," is anathema to the right of expressive association: to ensure that divergent voices, such as those of the Native Americans, not be silenced.[14]

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[14] As Associate Professor of Indian Law, Kevin J. Worthen explained in a recent essay:

> The most egregious example of an unconstitutional intrusion affecting the philosophical cast of the tribe occurred in the 1950's when Congress "terminated" a number of tribes.
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> * * *

Justice O'Connor, in her concurring opinion in the *Roberts* case, added that "protected expression may also take the form of . . . inculcation of traditional values [and] instruction of the young. . . ." 468 U.S. at 636. It is hard to imagine any expressive association that personifies Justice O'Connor's description better than an Indian tribe.

The Ute Tribe also meets the criteria in the *Roberts* opinion of an intimate association. The Court identified intimate associations in terms of the functions they perform, including: "cultivating and transmitting shared ideals and beliefs;" "foster[ing] diversity;" "act[ing] as a critical buffer between the individual and the state;" "the raising and education of children;" cohabitation with one's relatives;" "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctly personal aspects of one's own life." 468 U.S. at 619. These criteria are quintessential characteristics of tribal culture.[15]

In addition to the functional test, this Court suggested other identifying characteristics of intimate associations, noting that the suggested characteristics were neither in-

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> [I]nfringments on this associational right are permissible only if the legislation advances a "compelling state interest[], *unrelated to the suppression of ideas*, that cannot be achieved through means significantly less restrictive of associational fredoms." Under this test, termination legislation, which was designed solely to make the members of the affected tribe more "white" by suppressing the proliferation of Indian ideals is clearly unconstitutional.
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> Worthen, Kevin J., *Sword and Shield*: The Past and Future Impact on Western Legal Thought on American Indian Sovereignty, Harvard Law Review, Vol. 104, No. 6, April 1991.

[15] Tribal members experience more than ordinary cultural diversity from mainstream society. Each day they face assimilationist pressures to blend into the American melting pot. Each member has a greater need to orient his or her self-identification in terms of tribal association.

dispensable nor all-inclusive. 468 U.S., at 620. Those identifying characteristics included selectivity in membership, purpose, seclusion from others in critical aspects of the relationship, and size.

Even if those criteria suggested by the Court are mandatory, the Indian tribe measures up to those criteria rather well. For example, tribes are highly selective of their choice of tribal members. Membership is generally granted only to those related by blood to other tribal members. Such is, and always has been the case, with the Ute tribe. The tribal relationship is closely akin to the family relationship in this respect. One can become part of the association only by being born into it.

Similarly, the tribal relationship satisfies the *Roberts* "purpose" requirement. Tribes exist, in large part, to perpetuate a way of life. Mainstream American society long has recognized this fact, which explains why past efforts to eliminate Native American culture and assimilate Native Americans have been aimed directly at the tribes themselves. For example, the 1879 General Allotment Act, the first formal effort to assimilate Native Americans, was intended, in the words of Theodore Roosevelt, to be "a mighty pulverizing engine to break up the tribal mass." [16] The omission of the "Establishment Clause" in the Indian Civil Rights Act of 1967 was no doubt in recognition of the function of the Indian tribe to preserve and administer the tribal religion as an essential part of tribal culture. Worthen, Kevin J., *One Small Step for Courts, One Giant Leap for Group Rights; Accommodating the Associational Role of "Intimate" Government Entities,* North Carolina L. Rev., Vol. 104, No. 3, March 1993.

As to the third characteristic, Indian tribes generally exclude non-members from important aspects of the asso-

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[16] *A Compilation of the Messages and Papers of the Presidents,* 1789-1914, at 6674 (James D. Richardson, ed., 1896-1917).

ciation, including tribal ceremonies, sacred religious customs, and sweat lodges. Worthen, *supra*, at 635.

While the size characteristic may be more difficult to meet, even that aspect is relative. In *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), the majority and concurring opinions both expressed that an organization of over 400 members would not necessarily fail to qualify as an intimate association because of sheer size alone. 487 U.S. at 12 and 19. The Supreme Court also reiterated in *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987), "we have not held that constitutional protection is restricted to relationships among family members."

The magnitude of this question expands to the much larger question of whether our first Americans have any stake in the Constitution of this land at all. To date, no decision of this Court or of any of the other federal courts has annulled an act of Congress on the basis that Native Americans enjoy the same protecion as other minorities under the Bill of Rights.[17] Failure to acknowledge to the American Indian tribe the same autonomy and self-government concerning membership that we enjoy in our own social clubs, organizations, and even religions, jeopardizes the fundamental First Amendment freedoms of every American citizen. Our freedoms are not secured to any of us until they are secured to all of us.

A pronouncement of the Court, as to whether the specter of potential unilateral defeasance is still menacing, or whether Indian tribes enjoy the protection of the Constitution in their associations, would benefit not only the tribes,

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[17] This court recently invalidated an act of Congress concerning Indians in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), but the premise for overturning the statute was not Indian rights, but the 11th amendment states' sovereignty. In *United States v. Antelope*, 523 F.2d 400 (9th Cir. 1975), a federal court challenge to the Major Crimes Act, 18 U.S.C. § 1153 was held to be unconstitutional on grounds of equal protection, but the decision was reversed at 430 U.S. 641 (1977).

but also the government in the furtherance of current Indian policy. Of necessity, that pronouncement by this Court must come from a challenge to the prior termination legislation, such as Petitioner's. As one prominent Native American scholar explained: "Termination is out of fashion and dead as an announced policy, but termination with a small 't' is not. For tactical purposes other names might be used, but the long range goal will not change." Philip S. Deloria, *The Era of Indian Self Determination: An Overview*, in Indian Self Rule: First-Hand Accounts of Indian-White Relations From Roosevelt to Reagan 191, 192 (Kenneth R. Philip ed. 1985). Whether such skepticism is warranted or not, as long as the perception of such vulnerability remains, termination will retain a debilitating influence in modern Indian policy.

b. In addition to the First Amendment issue, the Tenth Circuit's resistance to follow *Menominee* and its willingness to conflict with the Ninth Circuit, mandates consideration of the criteria Congress used to dismantle the Ute Tribe. Racially discriminatory legislation is as invidious when targeting persons of Indian ancestry, as it is when targeting persons of any other race. Previous cases that have come to the Court on the issue of racial equal protection for Native Americans have been reconciled on the principle that the category "Indian" is not a racial category, but a political one. *United States v. Antelope*, 430 U.S. 641 (1977); *Morton v. Mancari*, 417 U.S. 535, 552, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). But the Terminated Utes are individuals; not "a quasi-sovereign tribal entity," but are individuals, who are defined by a discrete racial label. The United States Congress has no greater authority to legislate against individuals of a particular Indian race, or mixed race, than it does against individuals of any other race.[18]

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[18] Professor Lawrence W. Tribe explains:

> Judicial decisions and actions of Congress subsequent to *Williams v. Lee* manifest continued adherence by the nation to

Perry Murdock's case gives the Court an opportunity to finally address that question, because rather than dealing with the Ute Tribe as a Tribe, Congress encroached within the political entity of the tribe, and defined the individuals into two racial classes. The Tenth Circuit attempted to shield its decision behind *Antelope* and *Mancari* on the premise that the Ute Termination Act addressed the tribe as a whole, ignoring the fact that the Act creates two separate classifications and deals with them in two separate ways. Apparently, the court would have reached the same result if Congress had expelled the women and kept the men, expelled the protestants and kept the agnostics, or expelled the socialists and kept the capitalists.

c. In both *Menominee* and *Kimball,* the pervasive issue that directed this Court and the Ninth Circuit toward a liberal interpretation of termination was the effect any

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the core of *Worcester* and to related doctrines which lie at the foundation of the law governing United States Indian relations. In brief, those doctrines establish: (1) The political conception of Indian tribes as governments having inherent powers and attributes of sovereignty—powers which may with certain exceptions, and subject to certain limits, be exercised as against all persons and in respect of all conduct affecting Tribal Indians within a tribe's territorial jurisdiction free of state interference except as expressly provided to the contrary by treaty or act of Congress; (2) The principle of the legal equality of races, and the concomitant doctrines (a) *that Congress has no greater authority to legislate in respect of individuals of the American Indian race, solely on account of their race, than it has in regard to persons of any other race,* (b) that Congress' Indian affairs powers are properly exercised to restrict individual conduct or to preempt state action *only with respect to or on behalf of Indian tribes or "dependent Indian communities" and individuals of the American Indian race who remain affiliated with such tribes or communities,* and (c) *that any state or Federal action directed at persons of the American Indian race as a racially defined class is subject to strict scrutiny to prevent invidious discrimination just as in the case of government action directed at any other racial minority; . . .* (emphasis added). Tribe, L., *American Constitutional Law,* 2d Ed. § 16-14, at 1469-72 (1988).

other interpretation would have on the abrogation of treaty rights. Clearly, the Tenth Circuit's opinion results in the abrogation of treaty rights to the descendants of 27% of the tribe, but in addition, the court concluded the rights no longer belong to the Uintah Band that once owned rights exclusively. Just a few weeks ago, this Court again affirmed that Congress' intent to alter an Indian treaty's terms . . . must be 'clear and plain.' *U.S. v. Dion*, 476 U.S. 734, 738-739." *South Dakota v. Yankton Sioux Tribe*, —— U.S. ——, 118 S.Ct. 789, 791 (1998). In *Dion*, the Court also said,

> 'Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . .' *Washington v. Washington Commercial Passenger Fishing Assn.*, 443 U.S. 658, 690. We do not construe statutes as abrogating treaty rights in 'a backhanded way'. *Menominee Tribe v. United States*, 391 U.S. at 412.
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> * * * *
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> *What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.*

476 U.S. at 739-740 (emphasis added). Neither the Indian Reorganization Act nor the Ute Termination Act contain any evidence that Congress ever considered the Uintah's treaty rights in either legislation.

The freedom of association, equal protection, and the treaty rights issues that surface when termination is given the sweeping effect engendered by the Tenth Circuit's decision, manifests the discretion of this Court and the Ninth Circuit in using the contrasting approach used in *Menominee* and *Kimball*. They also manifest the need for this Court to grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-4150

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PERRY VON MURDOCK,
Defendant-Appellant.

Oct. 20, 1997

Before SEYMOUR, Chief Judge, PORFILIO and BALDOCK, Circuit Judges.

SEYMOUR, Chief Judge.

Perry Von Murdock was charged with violating 18 U.S.C. § 1165, which prohibits hunting on land belonging to an Indian Tribe without lawful authority or permission. He moved to dismiss the charge on the ground that he is an Indian with inherent rights to hunt and fish on the land in question. The district court rejected this argument, *see United States v. Murdock*, 919 F.Supp. 1534 (D. Utah 1996), and Mr. Murdock entered a conditional plea of nolo contendere. He appeals, renewing his argument that his status as an Indian precludes his conviction. We affirm.

I

This appeal requires the court to again address the operation and effects of the Ute Termination Act, 25 U.S.C. §§ 677-677aa (UTA or the Act). Although the Act was passed in 1954, it continues to generate considerable litigation, criticism, and controversy. *See, e.g., Hackford v. Babbitt*, 14 F.3d 1457, 1463-64 (10th Cir. 1994) (listing cases). The historical background leading up to the passage of the UTA is comprehensively set out in *Hackford, id.* at 1459-63, and we need not repeat it here. The purpose of the Act was to divide and distribute "the assets of the Ute Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof," to terminate federal supervision over the mixed-blood members, and to prepare the full-blood members for termination of federal supervision over them. 25 U.S.C. § 677.[1]

The Act defined full-bloods as those tribal members possessing one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half a degree, *id.* § 677a(b), and defined mixed-bloods as those members who did not possess sufficient Ute or Indian blood to fall within the definition of full-bloods and those full-bloods who chose to be designated as mixed-bloods, *id.* § 677a(c). Pursuant to the Act, proposed rolls were drawn up listing the names of the mixed-bloods and the full-bloods, and were published in the Federal Register and relevant county newspapers. *Id.* § 677g. After a period during which protests over inclusion in or exclusion from the rolls could be made to the Secretary of the Interior, the proposed rolls became final. *Id.* Upon publication of the final rolls, it was declared that "the tribe shall . . . consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise

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[1] We recognize that the term "mixed-blood" may be considered offensive. The UTA uses that term, however, and to avoid confusion we do so as well.

provided in this subchapter. New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder." *Id.* § 677d.

Once the final rolls were published, the tribal assets were divided based upon the relative numbers of persons on the two rolls, *id.* § 677i, and the assets of the mixed-bloods were distributed to them individually, *id.* § 677*l*. Those tribal assets that were "not susceptible to equitable and practicable distribution" were to be managed jointly by a tribal committee and authorized representatives of the mixed-bloods. *Id.* § 677i. Althugh the UTA did not specifically address tribal hunting and fishing rights, *United States v. Felter*, 752 F.2d 1505, 1509 (10th Cir. 1985), we have held that "the right to hunt and fish on the reservation is an 'asset[] not susceptible to equitable and practicable distribution' under § 677i," *id.* at 1512.

The Act provided that after distribution, mixed-bloods could dispose of their interests in the assets they received subject to the approval of the Secretary for a period of years, *id.* § 677n, and thereafter without federal supervision, *id.* § 677*o*. The United States actually ended its supervision over the affairs of the mixed-blood Utes and terminated its trust relationship with them on August 24, 1961. *See* Ute Termination Proclamation, 26 Fed.Reg. 8042 (1961).

II

Mr. Murdock was born in 1968. Both of his parents were listed on the final roll of mixed-blood Utes, and had received their respective shares of tribal property. Although Mr. Murdock's parents resided on the reservation when he was born, they were not members of the Tribe at that time, having lost their membership as a result of the UTA. See generally Chapoose v. Clark, 607 F.Supp. 1027 (D.Utah 1985). The Tribal Constitution effective when Mr. Murdock was born coupled with the UTA, which was initiated and drafted by the Tribe, see Affiliated Ute Citizens v. United States, 406 U.S. 128, 143, 92 S.Ct. 1456, 1467, 31 L.Ed.2d 741 (1972), together compel the

conclusion that "[n]o person who received a share of tribal assets as a mixed-blood can now gain membership in the tribe under § 1(b) of article II of the tribal constitution. Nor can the children of a terminated mixed-blood claim membership in the tribe through their mixed-blood parent." Chapoose, 607 F.Supp. at 1036 (construing Ute Tribal Constitution, Art. II, § 11, in effect in 1968, with UTA).[2] Mr. Murdock has never been a member, and he is not eligible for membership under either the requirements in effect at his birth or as amended.

In 1993, Mr. Murdock applied for a permit to hunt big game on the reservation but was turned down because he did not meet the Tribe's requirements, which for his purposes required membership in the Tribe. See Murdock, 919 F.Supp. at 1537, 1538 & n. 10. He nevertheless shot an elk on the reservation, resulting in the misdemeanor charges which are the subject of this action.

Notwithstanding the operation of the UTA, the Tribal Constitution, and his lack of a hunting permit Mr. Murdock maintains he is a member of the Tribe and therefore has an inherent right to hunt, and fish on the reservation. He bases this argument primarily upon a selective reading of the lower court's opinion in *United States v. Felter*, 546 F.Supp. 1002 (D.Utah 1982), and upon two Ninth Circuit cases addressing the operation of the Klamath Termination Act, *see Kimball v. Callahan*, 590 F.2d 768 (9th Cir.1979) (*Kimball II*); *Kimball v. Calla-*

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[2] The membership provisions have since been amended. The Constitution currently in effect describes Tribal membership as follows:

> (a) All persons whose names appear on the official tribal roll as of April 15, 1988.
>
> (b) After April 15, 1988, members in the Ute Indian Tribe of the Uintah and Ouray Reservation shall be limited to those persons who possess at least five-eighths (5/8) degree Ute Indian blood derived from the blood quantum of Ute Indians whose names appear on the Full-Blood Roll of March 27, 1956, published April 5, 1956, in 21 Federal Register 2208 *et seq.*

Aplt. App. at 188.

han, 493 F.2d 564 (9th Cir.1974) (*Kimball I*). Mr. Murdock also contends the UTA is unconstitutional on numerous grounds. For the reasons set out below, we conclude Mr. Murdock is not a member of the Ute Indian Tribe and he must therefore obtain permission to hunt on Tribal land. We further hold that the Act, although perhaps open to criticism, is not unconstitutional.

A

Mr. Murdock's argument that he is a Tribal member is rooted in the Ninth Circuit's discussion of the Klamath Termination Act (KTA) in the *Kimball* cases. In those cases, Klamath Indians who had withdrawn from the Tribe under the KTA and their descendants sought a declaratory judgment that they nonetheless retained treaty rights granted to the Tribe to hunt and fish on ancestral tribal land free of state regulation. *See Kimball I*, 493 F.2d at 565. Under the KTA, a final roll of tribal members was drawn up and each person on the roll had to elect whether to withdraw from the tribe and receive his share of tribal property or to remain in the tribe and participate in a tribal management plan. *Id.* at 567. The KTA provided that "[m]embers of the tribe who receive the money value of their interests in tribal property shall thereupon cease to be members of the tribe," 25 U.S.C. §564e(c), and further provided that "[n]othing in this subchapter shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty," *id.* § 564m(b).

In its first opinion, the Ninth Circuit relied upon *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), in which the Supreme Court addressed the Menominee Termination Act. That Act did not mention the Menominee Tribe's hunting and fishing rights, and the Court "decline[d] to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians." *Id.* at 412, 88 S.Ct. at 1711. Applying this holding, the court in *Kimball I* pointed out that not only did Congress fail

to clearly express its intent to abrogate the hunting and fishing rights of the Klamath Tribe in the KTA, but in fact Congress had expressly reserved those rights. *Kimball I*, 493 F.2d at 569. Accordingly, the court held:

> Since the Act provides that nothing in it shall abrogate any treaty fishing rights, we conclude that a Klamath Indian possessing such rights on the former reservation at the time of its enactment retains them even though he relinquishes his tribal membership or the reservation shrinks pursuant to the Act.

Id. The court further noted "[t]he Klamath Termination Act provides that withdrawn members of the tribe relinquish their interests in tribal property. Treaty rights to hunt and fish are, however, rights of the individual Indians." *Id.* at 569 n. 9 (citation omitted). The court therefore reversed the district court's dismissal of the plaintiffs' action for failure to state a claim.

On remand, the district court held that "the rights of Indians to fish, hunt, and trap, free of state regulations, extended to the descendants of persons on the final tribal roll." *Kimball II*, 590 F.2d at 771. It was to this ruling that the appellate court turned its attention in the second appeal, where it revisited the operation of the KTA. In addressing the first *Kimball* ruling, the court in *Kimball II* emphasized that the earlier decision was based on the KTA's provision specifically reserving fishing treaty rights. *Id.* at 772. The court said:

> Prior to the Termination Act, the Klamath Tribe held treaty hunting, fishing, and trapping rights within its reservation in which the individual members of the Tribe held rights of user. The Termination Act did not affect those rights. That an individual member withdrew from the Tribe for purposes of the Termination Act did not change his relationship with the Tribe as to matters unaffected by the Act, e.g., treaty hunting, fishing, and trapping rights.

Id. at 773. Applying these holdings to the issue of the exercise of treaty rights by the descendants of the terminated Klamaths, the court rejected the argument that the tribal roll was "final for purposes of determining who could exercise tribal treaty rights." *Id.* at 775. To the contrary, as the court pointed out, the KTA "specifically contemplated the continuing existence of the Klamath Tribe. . . . The Klamaths still maintain a tribal constitution and tribal government, which among other things establishes criteria for membership in the Tribe." *Id.* at 775-76 (footnote omitted).[3]

In the *Felter* cases, both the district court and this court considered the operation and effect of the Ute Termination Act on hunting and fishing rights in light of *Menominee Tribe* and the *Kimball* cases. Ms. Felter, a mixed-blood Ute whose tribal status was terminated following the passage of the Act, was prosecuted under section 1165 for fishing on tribal lands without a tribal permit. The district court observed that the Act contained no language expressly abrogating the mixed-bloods' hunting and fishing rights and did contain language in section 677i preserving

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[3] Although the *Kimball* decisions do not specifically address this fact, it is reasonable to infer from the court's discussion that the Klamath Tribe did not prohibit members who had withdrawn from the Tribe for purposes of the Act from continuing their Tribal membership for all other purposes. Significantly, the court noted in this regard that "one of the plaintiffs who withdrew from the Tribe pursuant to the Termination Act, is also a member of the Klamath Indian Game Commission." *Kimball II*, 590 F.2d at 776 n. 14.

Unlike the mixed-blood Utes, the terminated Klamaths did not retain an interest in those tribal assets that were not susceptible to division and the KTA therefore did not create a joint management plan for such assets. Thus, the terminated Klamath who served on the Tribe Game Commission apparently did so by virtue of his status as a member of the Tribe despite his termination. Moreover, the descendants of those terminated Klamaths who maintained their status as Tribal members in the eyes of the Tribe were apparently themselves considered members by the Tribe after termination. As such they held rights of user in those Tribal assets.

the mixed-bloods' interest in tribal assets not susceptible to division and distribution. *Felter*, 546 F.Supp. at 1017. Relying on *Menominee Tribe*, the court held that absent express abrogation, the Act did not extinguish either tribal hunting and fishing rights or individual interests in those rights. *Id.* at 1016-18. Because the mixed-bloods' rights in indivisible tribal assets such as hunting and fishing rights were specifically preserved by the Act, the court concluded that withdrawal from tribal enrollment under the Act did not "by itself extinguish vested hunting and fishing rights not otherwise affected by the act." *Id.* at 1018 (citing *Kimball II*, 590 F.2d at 773).

The district court then considered the nature of the hunting and fishing rights that were preserved in the Tribe and in which the mixed-bloods retained an interest. The court held:

> The rights and powers in question are *tribal* rights and powers. . . . An individual Indian's hunting or fishing right is measured wholly in relation to the nature and extent of the tribe's right. Tribal rights in property are owned by the tribal entity, and not as a tenancy in common of the individual members, including hunting and fishing rights.

Id. at 1021 (citations and footnote omitted). The court therefore held that although "withdrawal from membership in the tribe would generally result in the extinguishment of all individual rights of user in tribal property," the mixed-bloods' rights of user were preserved pursuant to section 677i. *Id.* at 1023. The court characterized this right as "a *personal* right. It was neither alienable, assignable, transferable nor descendible." *Id.* In so holding, the court relied on *Gritts v. Fisher*, 224 U.S. 640, 32 S.Ct. 580, 56 L.Ed. 928 (1912), which held that

> the lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to

> participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was not alienable or descendible.

Id. at 642, 32 S.Ct. at 581.

Applying the above analysis to the facts before it, the district court concluded:

> Individual mixed-blood Utes enrolled upon the final mixed-blood Roll (and still living) are thus entitled to hunting and fishing privileges within the Ute reservation equivalent to those afforded members of the tribe as now defined. As each of the mixed-blood Utes passes away, his or her personal right of user is extinguished, it being neither inheritable or transferable.

Felter, 546 F.Supp. at 1025 (footnote omitted) (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 185 (1942 ed.)). Accordingly, because tribal members were not at that time required to have a tribal permit in order to exercise their user rights to hunt and fish, the court held that Ms. Felter's lack of such a permit did not deprive her of that right. Her conviction under section 1165 for fishing on tribal land without lawful authority or permission therefore could not stand.

We affirmed on appeal, describing the district court's opinion as scholarly and its reasoning persuasive. *See United States v. Felter*, 752 F.2d at 1506. Like the district court, we found that the language in *Menominee Tribe* precluded "imput[ing] congressional intent to abrogate Indian rights to hunt and fish, absent explicit language to that effect." *Id.* at 1510. We also agreed with the district court that although the right to hunt and fish on tribal land is a tribal right, individual Indians hold a right of user in those rights that the UTA did not abrogate. *Id.* at 1509. Accordingly we "refuse[d] to impute to Congress an intent to abrogate the right of the mixed-

blood Ute Indians to hunt and fish on reservation land and instead [held] that the right to hunt and fish on the reservation is an 'asset[ ] not susceptible to equitable and practicable distribution' under § 677i." *Id.* at 1512.

We have discussed the above cases in detail because they are the basis upon which Mr. Murdock claims a right of user in the Ute Tribe's hunting and fishing rights, and because we are ultimately persuaded their analysis and holdings cannot be read to support Mr. Murdock's claim. Although Mr. Murdock has shifted ground somewhat during the course of this litigation,[4] we distill his arguments into two main contentions. First, he asserts that the reasoning of the *Kimball* cases applies fully here, and that because the Klamath Termination Act did not terminate the user rights of the descendants of terminated Klamaths, his user rights in tribal property as the descendant of mixed-blood Utes were likewise not terminated by the Ute Termination Act. Second, he asserts that the tribal rights at issue are those of the Uintah Band and not the Ute Tribe, and that he has rights of user as a member of the Uintah Band. We address each argument in turn.[5]

Mr. Murdock's attempt to rely on the *Kimball* cases is unavailing for several reasons. While both the district court and this court cited to the *Kimball* cases in discussing Ms. Felter's case, those citations did no more than acknowledge and agree with the Ninth Circuit's conclu-

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[4] Mr. Murdock concedes that the UTA applies to him as well as to his parents, Reply Br. of Aplt. at 1-2, and he does not claim that he inherited rights of user from his parents, *id.* at 2.

[5] Mr. Murdock also asserts that the federal courts are without jurisdiction in this proceeding because the action is in essence one to enforce a proclamation issued by the Ute Tribe and the Ute Development Corporation. As with many of Mr. Murdock's arguments, this one is based upon our acceptance of his position that he is a Tribal member entitled to hunt and fish on reservation lands. We hold that he is not. Tribal jurisdiction over this offense is therefore not exclusive, and his argument is foreclosed by *United States v. Felter*, 752 F.2d 1505, 1512 n. 11 (10th Cir.1985).

sion that under *Menominee Tribe*, congressional intent to abrogate tribal treaty and statutory rights will not be found absent express language to that effect. *See, e.g., Felter*, 752 F.2d at 1509-10 & n. 8; *Felter*, 546 F.Supp. at 1011, 1018. We also cited with approval *Kimball II*'s holding that individual Indians enjoy a right of user in their tribe's hunting and fishing rights. *See Felter*, 752 F.2d at 1509. However, to the extent Mr. Murdock asserts the *Kimball* cases as authority for the proposition that he holds a right of user in Ute Tribal rights, his argument is precluded by *Felter*.

As we have discussed, the district court in *Felter* specifically concluded that because rights of user are dependent upon the holder's status as a tribal member, those rights are personal to the member and therefore cannot be conveyed to another tthrough inheritance or in any other way. *Felter*, 546 F.Supp. at 1021, 1023-25 & n. 52. Although technically dicta, the court's observation that the children of mixed-bloods do not enjoy rights of user through inheritance is nonetheless the inescapable logical result of the nature of those rights. We therefore adopt that principle and apply it here.

Moreover, we do not view our holding as in conflict with the *Kimball* cases. We construe those cases as deciding that the tribal rights to hunt and fish granted the Klamath Tribe and the rights of user held by individual members were not terminated by the KTA, and that the Tribe itself continued to exist and define its membership and the concomitant rights of user after the KTA went into effect. We further read the result in those cases as resting on the fact that the descendants of the terminated Klamaths who retained their rights of user did so not by virtue of inheritance but *through their own continued membership in the Klamath Tribe*. To the extent those cases can be read as allowing rights of user to pass by inheritance, we decline to follow them.

Although conceding that he cannot inherit rights of user from his parents, Mr. Murdock argues that his parents

remained members of the Ute Tribe after passage of the UTA and that he was therefore born a member of the Tribe. In so doing, Mr. Murdock relies on language from the above cases stating that the termination acts effected only an incomplete withdrawal from tribal membership. We have already noted, however, that the UTA specifically declared an end to the tribal membership of mixed-bloods once they received their share of the tribal assets, and recognized the right of the Tribe to *thereafter* determine new members. See 25 U.S.C. § 677d; Chapoose, 607 F.Supp. at 1034-36. Because Mr. Murdock's parents were not members of the Tribe at the time of his birth, he did not become a member pursuant to the Ute Tribal Constitution in effect at the time. Nor has he subsequently met the Tribe's requirements for membership. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32, 98 S.Ct. 1670, 1684 n. 32, 56 L.Ed.2d 106 (1978). The UTA, which was initiated and drafted by the Tribe, *see Affiliated Ute Citizens v. United States*, 406 U.S. 128, 143, 92 S.Ct. 1456, 1467, 31 L.Ed.2d 741 (1972), specifically reserved this right to the Tribe. We are not at liberty to define tribal membership in a manner at odds with the Tribe's exercise of its sovereign right to do so.

Alternatively, Mr. Murdock contends he remains a member of the Uintah Band, which together with two other Bands joined to form the Ute Tribe, and he therefore retains hunting and fishing rights by virtue of that membership. This argument is untenable, however, in light of the history of the formation of the Ute Tribe and the provisions of its Constitution.

The current Uintah and Ouray Reservation is formed from portions of two prior reservations, the Uintah Valley Reservation, which was originally inhabited by the Uintah and Whiteriver Bands of Ute Indians, and the Uncompahgre Reservation, which was originally inhabited by the Uncompahgre Band. *See Hackford*, 14 F.3d at 1459;

Murdock, 919 F.Supp. at 1536. In 1937, pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 461-79, the three Bands joined together to form the Ute Indian Tribe of the Uintah and Ouray Reservation, and adopted a constitution and bylaws.[6] *Hackford*, 14 F.3d at 1461. The Preamble to the Constitution of the Ute Indian Tribe states that "the Ute Indians of the Uintah, Uncompahgre and Whiteriver Bands hereafter to be known as the Ute Indian Tribe of the Uintah and Ouray Reservation . . . do ordain and establish this Constitution for the Ute Indian Tribe of the Uintah and Ouray Reservation." Aplt. App. at 188. Article I provides that "[t]he Jurisdiction of the Ute Indian Tribe of the Uintah and Ouray Reservation shall extend to the territory within the original confines of the Uintah and Ouray Reservation. . . ." *Id.* Significantly, Article VI, § 4 states:

> Any rights and powers heretofore vested in the Tribe or bands of the Uintah and Ouray Reservation but not expressly referred to in this Constitution shall not be abridged by this article, but may be exercised by the people of the Uintah and Ouray Reservation *through the adoption of appropriate By-laws and constitutional amendments.*

Id. at 192 (emphasis added).

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[6] In the late nineteenth century, in response to the expansion westward of white settlers, the federal Indian policy that gave rise to the creation of reservations shifted toward a policy of assimilation. *Hackford v. Babbitt*, 14 F.3d 1457, 1459 (10th Cir. 1994). Pursuant to this shift, Congress passed the General Allotment Act, 25 U.S.C. §§ 331-90, which "allowed the break-up of Indian reservations into individual homesteads on which, Congress expected, the Indians would farm and become self-sufficient." *Id.* In 1934, Congress discontinued its assimilation policy and passed the Indian Reorganization Act, which "halted the allotment of tribal land and recognized the right of tribes to draw up constitutions and corporate charters for self-governance." *Id.* at 1461. The Ute Termination Act is the product of yet another shift in federal policy that occurred in the 1950s and sought to reduce federal involvement in Indian affairs. *Id.* at 1461-62.

The Constitution thus makes clear that the Bands ceased to exist separately outside the Ute Tribe, that jurisdiction over what was formerly the territory of the Uintah Band was to be exercised by the Ute Tribe, and that the rights formerly vested in the Uintah Band were to be defined by the Ute Constitution and exercised by the Ute Tribe. In light of these provisions, Mr. Murdock's argument that the Uintah Band's hunting and fishing rights retain a separate existence and belong only to the Uintah Band is groundless. Even if Mr. Murdock is correct that the Uintah Band continues to maintain its own identity, under the Ute Constitution the Band does so only within the context of the Ute Tribe. Accordingly, Mr. Murdock has no right of user in hunting and fishing rights originally granted to the Uintah Tribe.

B

Mr. Murdock also challenges the constitutionality of the UTA with a laundry list of claims, a number of which he has no standing to raise and many of which are supported by little or no authority. We begin our consideration of his arguments by setting out the legal principles which govern our analysis and allow us to dispose of most of his assertions summarily.

"[T]he power of the Federal Government over the Indian tribes is plenary." *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851, 105 S.Ct. 2447, 2451, 85 L.Ed.2d 818 (1985).

> [F]ederal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.
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> . . . .

> [S]uch regulation is rooted in the unique status of Indians as a separate people with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a racial group consisting of Indians.

United States v. Antelope, 430 U.S. 641, 645-46, 97 S.Ct. 1395, 1398-99, 51 L.Ed.2d 701 (1977) (footnote and internal quotations omitted). Moreover, this court has upheld the UTA against an assertion that it "arbitrarily and capriciously discriminates against the mixed-blood group." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Probst*, 428 F.2d 491, 498 (10th Cir.1970) (on denial of reh'g) (per curiam). We stated that "the classification into the two groups was supported by the Indians, was relevant to the purposes of the legislation, and had a reasonable basis. We find no arbitrary or capricious discrimination which violates Fifth Amendment due process." *Id.*

Notwithstanding the above authority, Mr. Murdock contends the UTA is racially discriminatory because it is directed to the mixed-bloods as a racial class rather than as a tribal entity. We disagree. The purpose of the UTA was to end federal supervision over the Ute Tribe. In pursuit of that goal, Congress determined that not all Tribal members were similarly situated with respect to their ability to manage their own affairs. Accordingly, Congress divided the Tribe into two classes, one whose members Congress had reason to believe were approaching the point at which federal supervision over them could be ended, and one whose members were not. This classification was part of a statute in which Congress dealt with the Tribe as a Tribe.[7] We conclude the Act does not con-

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[7] Indeed, any statute that regulates Indian affairs must of necessity have some means of distinguishing individuals who are Tribal members from those who are not for purposes of the legislation. "Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the

stitute improper racial discrimination, and we reject Mr. Murdock's claims that the Act violates due process and equal protection under the Fifth Amendment.

Mr. Murdock asserts the Act violated procedural due process by failing to provide personal notice to those affected by its operation. The Act provided for notice by publication in the Federal Register and "in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah." 25 U.S.C. § 677g. Mr. Murdock was not yet born when the Act took effect, he has never been a Tribal member with interests which would trigger the right to notice, and he therefore has no standing to challenge the adequacy of the notice provision.

Mr. Murdock further contends the Act is violative of the First Amendment because it interfered with the internal affairs of the Tribe and altered its philosophical cast, thereby changing the Tribe's message. To the extent that Mr. Murdock is asserting an infringement of the Tribe's rights, he has no standing to do so. Mr. Murdock also contends the Act is unconstitutional because it prevents him from expressing his own First Amendment right to identify with the Tribe and to vote in Tribal elections. This argument overlooks the fact that it is the Tribal Constitution's definition of those who may be Tribal members that prevents Mr. Murdock from participating in Tribal affairs. The Act did no more than allow the Tribe to establish its own criteria for membership, under which Mr. Murdock is not a member of the Tribe.

We have considered Mr. Murdock's remaining challenges to the constitutionality of the Ute Termination Act and we find them either unsupported by citation to relevant authority or without merit. Accordingly, we AFFIRM the judgment of the district court.

United States Code (25 U.S.C.) would be effectively erased. . . ." *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977) (internal quotations omitted) (alterations in original).

APPENDIX B

UNITED STATES DISTRICT COURT
D. UTAH
CENTRAL DIVISION

No. 93-CR-308G

UNITED STATES OF AMERICA,
Plaintiff,

v.

PERRY VON MURDOCK,
Defendant.

March 5, 1996

MEMORANDUM DECISION AND ORDER

J. THOMAS GREENE, District Judge.

This case is before the court as a result of a pending Misdemeanor Information in which defendant Perry Von Murdock is charged with hunting on Indian land without lawful authority or permission in violation of 18 U.S.C. § 1165. The government has filed a Motion to Determine Defendant's Indian Status and defendant has filed a Motion to Dismiss and Motion to Bifurcate Issues. These motions have been extensively briefed by the parties,[1] as

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[1] The United States is represented by Scott M. Matheson, Jr., United States Attorney, Stephen Roth. Assistant United States Attorney, and Matthew R. Howell, Asistant United States Attorney; defendant is represented by Kent A. Higgins of Idaho Falls, Idaho.

well as amicus curiae,[2] and after argument were taken under advisement.

Background

In 1861, President Lincoln by Executive Order established over two million acres of land in northeastern Utah as the Uintah Valley Reservation for the use and occupation of the Uintah Band of the Ute Indians.[3] In the early 1880s, the Whiteriver Band of Ute Indians was relocated from Colorado to the same reservation, and the Uncompahgre Band of Ute Indians was established on adjacent lands. The reservations were combined in 1937 to form the Uintah and Ouray Indian Reservation. In that same year the three Bands joined together to form the Ute Indian Tribe[4] and adopted a Constitution. In 1954, pursuant to a policy of assimilating Indians into mainstream American society, the Ute Partition Act divided the Tribe into two groups: the "full-bloods" (those with one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half) and the "mixed-bloods" (those with insufficient Indian or Ute blood to qualify as "full-bloods" and those full-blood Utes who by choice became mixed-

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[2] The Ute Indian Tribe of the Uintah and Ouray Reservation, represented by Robert S. Thompson, III, General Counsel for the Ute Indian Tribe and John R. Lehmer, Local Counsel, submitted a brief in support of plaintiff United States of America. The Aboriginal Uintah Nation represented by Edson Gardner, Legal Advocate, filed a brief in support of defendant and the Motion to Dismiss. The Native Civil Rights Project, Dora Van, Executive Director, filed documents pertinent to the issues before the Court. The Ute Distribution Corporation, represented by Max D. Wheeler and Camille N. Johnson, submitted a brief as an interested party in this litigation and as the authorized representative of the mixed-blood Ute Indians.

[3] The Executive Order was confirmed by an Act of Congress in 1864—13 Stat. 63 (Act of May 5, 1864, Chapter 77).

[4] This was done pursuant to authorization set forth in the Indian Reorganization Act, 48 Stat. 984, 987 (June 18, 1934—Section 16).

blood members.[5] Under the authority of that Act, also known as the Ute Termination Act, final membership rolls listing the full-blood and mixed-blood members of the Tribe were published in the Federal Register.[6] The Ute Termination Act provided that as of the date of publication of the final rolls (April 1956, "*the [Ute Indian] Tribe shall thereafter consist exclustively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided* [in the Act]," 25 U.S.C. § 677d (emphasis added). The Act further provided for removal of federal restrictions on the property of the "mixed-bloods," as well as termination of the federal trust relationship and services as to them:

> *Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated,* and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

25 U.S.C. § 677v (emphasis added). Because of the Ute Termination Act, the 490 mixed-bloods whose names were on the final roll of mixed-blood members of the Ute Indian Tribe are sometimes referred to as "Terminated Utes." The parents of defendant were listed on the final roll as among the mixed-blood terminated Utes.

The Tenth Circuit has noted that the Ute Termination Act was intended to assimilate the mixed-bloods by doing away with their wardship status. In *Ute Indian Tribe of the Uintah and Ouray Reservation v. Probst*, 428 F.2d 491, 498 (10th Cir.), cert. denied, 400 U.S. 926, 91

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[5] 25 U.S.C. § 677b and § 677c.

[6] 21 Fed.Reg. 2208-12, April 5, 1956. The final rolls set forth the names of 490 mixed-blood Utes and 1314 full-blood Utes.

S.Ct. 189, 27 L.Ed.2d 186 (1970) the court stated that the Ute Termination Act "will permit the mixed-bloods to progress toward termination of Federal supervision without being held back by the full-bloods who desire continuation of wardship status." *Id.* at 498 (quoting House Report No. 2493, 83d Cong. 2d Sess., 2 U.S.Code Cong. & Admin.News 1954, at 3355-56).

On August 26, 1961, the Secretary published in the Federal Register a proclamation, entitled "Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, Termination of Federal Supervision Over the Affairs of the Individual Mixed-Blood Members."[7] The Supreme Court has held that the Termination Proclamation fulfilled the purpose of the Ute Termination Act, "namely the termination of federal supervision over the trust and restricted property of the mixed-bloods," and upheld the Tenth Circuit's conclusion that thereafter "[n]o form of wardship or of federal trust relationship existed" between the United States and the mixed-blood Utes with respect to mixed-blood property. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 148-49, 156, 92 S.Ct. 1456, 1469-70, 1473, 31 L.Ed.2d 741 (1972) (citing *Reyos v. United States*, 431 F.2d 1337, 1340-43 (10th Cir. 1970)). Accordingly, since the Termination Proclamation, the mixed-blood Utes have no longer had the status of federally-recognized Indians.

Notwithstanding their termination, the statute provides that the mixed-bloods retain an interest in, and the right to jointly manage with the Tribe, all assets of the Tribe that were "not susceptible to equitable and practicable distribution" at the time partition became effective.[8] Judge Jenkins of this court in *United States v. Felter*, 546 F.Supp. 1002, 1025 (D. Utah 1982), *aff'd.* 752 F.2d 1505 (10th Cir.1985), ruled that the right of mixed-

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[7] 26 Fed.Reg. 8042 [hereinafter the Termination Proclamation].

[8] 25 U.S.C. § 677i.

bloods to hunt and fish on the Reservation "is incapable of practicable and equitable distribution under [25 U.S.C.] § 677i."

Felter at 1025.

In recognition that hunting and fishing rights on the reservation are not capable of practicable and equitable distribution and that such must be regulated, the Ute Indian Tribe and the mixed-bloods, acting through the Ute Distribution Corporation as representative,[9] each year thereafter jointly promulgated hunting and fishing regulations. In 1993-94, the following Proclamation was in effect when the alleged offense occurred:

> No tribal member, no terminated Ute, no non-member Indian, and no non-Indian . . . may hunt any species of animal on trust lands or other lands within the exterior boundaries of the Uintah and Ouray Reservation unless said person has first obtained a valid permit to hunt said species from the Ute Tribe Fish and Wildlife Department, in accordance with the rules established in this Proclamation.[10]

Defendant Perry Von Murdock was born on May 28, 1968, the son of two mixed-blood Utes, Colin Murdock and Laura Jane Hackford Murdock. Defendant's parents resided on the Uintah and Ouray Indian Reservation at the time of his birth. The names of defendant's parents

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[9] Pursuant to 25 U.S.C. § 677i, the mixed-bloods established the Ute Distribution Corporation as their authorized representative for purposes of jointly managing with the Tribe the indivisible assets. *See Murdock v. Ute Indian Tribe*, 975 F.2d 683 (10th Cir.1992), *cert. denied*, 507 U.S. 1042, 113 S.Ct. 1879, 123 L.Ed.2d 497 (1993).

[10] Paragraph C5 of the Proclamation provides:

> Unless otherwise provided, those persons entitled to receive a permit to hunt on tribal land of the Uintah and Ouray Reservation shall consist exclusively of tribal members and terminated Utes who meet the requirements for issuance of a permit set out herein.

were on the final mixed-blood role published in the Federal Register in 1956 pursuant to the Ute Partition and Termination Act 25 U.S.C. § 677a *et seq.*, as numbers 301 and 302 respectively. Murdock's parents became terminated mixed-blood Utes in 1961 as a result of the Termination Proclamation which ended their federal Indian status. At the time of defendant's birth, his parents were not members of the Ute Tribe.

Defendant Murdock never applied for membership in the Ute Tribe nor does his name appear on its membership role. In 1993, he applied for a permit to hunt big game on the Ute Reservation, but his application was rejected because he did not meet the requirements of the applicable hunting and fishing regulations.

Analysis

The Misdemeanor Information pending against defendant charges:

> On or about October 2, 1993, in the Central Division of the District of Utah and elsewhere, PERRY VON MURDOCK, the defendant herein, did knowingly and intentionally go upon *land belonging to the Ute Indian Tribe* and held in trust by the United States, for the *purpose of hunting and removing game therefrom* and did take an elk *without lawful authority or permission* in that he *did not have a permit* for taking such elk as required by the 1993/94 Ute Tribe Big Game Proclamation § B(1) and (2); all in violation of 18 U.S.C. § 1165. (Emphasis added.)

18 U.S.C. § 1165 provides as follows:

> [w]hoever, *without lawful authority or permission,* willfully and knowingly goes upon *any land that belongs to any Indian or Indian tribe, band or group* and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United

> States reserved for Indian use, for the *purpose of hunting, trapping, or fishing* thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited. (Emphasis added.)

The pending motions identify possible defenses—such as the alleged status of defendants as an Indian with inherent hunting and fishing rights—which could preclude prosecution of the defendant as a matter of law. There follows a discussion of those defenses.

Defendant's Right to be Informed of Charges

Defendant claims in his motion to dismiss that the essence of the charge against him is trespass and that the only charge which is cognizable under 18 U.S.C. § 1165 is trespass upon Indian lands by non-Indians. The government responds that the charge on its face is not trespass and that the government is proceeding only on a theory of "no valid license."[11] It is clear from the face of the Misdemeanor Information that defendant is on notice that he is charged with hunting on Indian land without valid authorization or permission. Accordingly, this court holds that the Sixth Amendment of the United States Constitution is not implicated in that there has been no denial of plaintiff's right to be informed of the charges against him.

Jurisdiction

Defendant argues that he is an Indian and that the purpose of 18 U.S.C. § 1165 is to prevent non-Indians from hunting on tribal lands, citing *United States v. Jackson*, 600 F.2d 1283 (9th Cir.1979). The government counters that *Jackson* only stands for the proposition that under 18 U.S.C. § 1165 federal courts will not take jurisdiction of *tribal members* who violate tribal hunting laws.

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[11] Government Reply Brief, p. 4, fn. 3.

In this regard, the government points out that in *United States v. Felter*, 546 F.Supp. 1002, 1026 (D. Utah 1982), aff'd 752 F.2d 1505 (10th Cir.1985) Judge Jenkins found that *Jackson* did not apply to non-tribal members, stating:

> Though entitled to the fishing rights of a member of the tribe, Oranna B. Felter [the defendant] is no longer so enrolled, nor is she federally recognized as "Indian." Her situation is, therefore, distinguishable from that of the defendant in *United States v. Jackson*, 600 F.2d 1283 (9th Cir.1979), in which the United States Court of Appeals for the Ninth Circuit held that 18 U.S.C. § 1165 was not applicable to tribal members who hunted in violation of tribal regulations. Tribal jurisdiction over such minor offenses remains exclusive. . . . Indian tribes lack jurisdiction to try and punish non-Indians for criminal offenses, . . . and 18 U.S.C. § 1165 was designed to fill that gap in enforcement powers as to non-Indians hunting or fishing on tribal or other Indian lands without tribal permission. . . . Because of The Termination Act, Oranna B. Felter would fall into the "non-Indian" category.

Defendant is charged with hunting on Ute tribal lands without a permit. He applied for such a permit and was refused because he did not qualify under the terms of aforesaid hunting and fishing regulations. As is discussed hereinafter, defendant has never been a member of the Ute Tribe, and his parents were not members of the Ute Tribe when he was born. This court holds that it has jurisdiction over hunting and fishing violations of the criminal law on reservation lands by non tribal member Indians as well as non Indians. In any event, this court has jurisdiction to determine whether jurisdiction exists where factual determinations, such as tribal membership, come into play. *See generally, Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 60 S.Ct. 317, 319, 84 L.Ed. 329 (1940).

Tribal Member Status of Defendant Under Requirements of Ute Indian Tribe

The Ute Termination Act provided that as of the date of publication of the final rolls (April 1956), "the [Ute Indian] tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided [in the Act]," 25 U.S.C. § 677d. The Ute Termination Act also provided that the Ute Indian Tribe shall have exclusive control over the requirements of membership in the Tribe:

> New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and the ordinances enacted thereunder. 25 U.S.C. § 677d.

It is clear from the record that defendant has never applied for membership in the Ute Tribe. Application for membership is an absolute requirement.[12]

In *Chapoose v. Clark*, 607 F.Supp. 1027 (D.Utah, 1985, Winder, J.), this court upheld the Tribe's right to determine its membership, including the right to reject claims of membership based upon birth alone.[13] The court

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[12] *Tingey v. Ute Indian Tribe*, opinion of Ute Tribal Business Committee of the Ute Indian Tribe (November 1992).

[13] In *Chapoose*, Judge Winder ruled that:

> After the division of full-bloods and mixed-bloods was complete, Congress intended that the Ute Tribe, now consisting of full-bloods only, be able to set its own membership requirements, just as it had done since 1937. The tribe was to set these membership requirements in its constitution, bylaws, and ordinances, just as it had done since 1937. 25 U.S.C. § 677d. Nowhere is there any indication that Congress intended to take away the Tribe's right to determine its own membership. Indeed, every indication, and there are many express indications, was that the Ute Tribe would continue to set its own membership requirements. The only change was that the mixed-bloods were no longer tribal members for the purposes of sharing in trust fund distributions. . . .
>
> No person who received a share of tribal assets as a mixed-blood can now gain membership in the tribe under § 1(b) of

in *Chapoose* further held that as a result of Ute Termination Act,

> "[t]he mixed-bloods were to be given their share of tribal assets and then be assimilated into society. With some minor exceptions, they would no longer be treated as an Indian tribe. The full-bloods, on the other hand, were not to be terminated as a tribe. *The Ute Tribe would continue as a tribe, with only the full-bloods as members and not the mixed-bloods.*"

(*Id.* at 1032 (emphasis added)).

Defendant cannot claim tribal membership under the Ute tribal constitution in effect when he was born, which provided:

> No person who received a share of tribal assets as a mixed-blood can now gain membership in the tribe under § 1(b) of article II of the tribal constitution. *Nor can the children of a terminated mixed-blood claim membership in the tribe through their mixed-blood parent.* (Article II, § 11 of the Tribal Constitution in effect when plaintiff was born.)

Although defendant's parents were original mixed-blood members on the roll, they were not tribal members

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article II of the tribal constitution. *Nor can the children of a terminated mixed-blood claim membership in the tribe through their mixed-blood parent.* The only way a child can gain membership in the tribe is by claiming membership through a parent who was a tribal member residing on the reservation when the child was born. Allowing a child in that category to have a right to tribal membership is fully consistent with the tribal members' desires to give their children a birthright. Moreover, it is entirely consistent with the intent of Congress to terminate the mixed-bloods and to continue the tribe of full-bloods. The mixed-bloods have no more interest in the Tribe under this court's interpretation than any other non-Indian.

607 F.Supp. at 1034 (emphasis added).

after they were terminated in 1961. Defendant as a child of mixed-blood parents could not in any event claim tribal membership under the aforesaid tribal constitution.

The Tenth Circuit in *Gardner v. United States*, 25 F.3d 1056, 1994 WL 170780, (10th Cir. (Utah)), adopted and approved Judge Winder's conclusion that neither mixed-blood Terminated Utes nor their descendants under the Ute Tribal Constitution can be members of the Tribe:

> Further, the Act provided that effective upon publication of the final rolls, "the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this subchapter. New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder." § 677d. *This section was interpreted to mean that mixed-blood descendants can no longer become members of the tribe under its constitution. Chapoose v. Clark*, 607 F.Supp. 1027, 1036-37 (D.Utah 1985). Nor are mixed-blood descendants a federally recognized tribe of their own. *See* 58 Fed.Reg. 54,364 (1993). (Emphasis added).

This court holds that defendant has no status as a member of the Ute Indian Tribe under its Constitution and the requirements imposed by the Ute Tribe as to its membership.

Alleged Rights of Defendant as a Member or Descendant of the Uintah Band

Defendant Murdock claims the right to hunt and fish on tribal lands because he is a member or a descendant of persons who belonged to the Uintah Band of Ute Indians.[14] The government concedes that defendant is such

[14] As previously noted, three separate Bands of Ute Indians in the past were established in the Uintah and Ouray Reservation: the Uintah Band, the Whiteriver Band and the Uncompahgre Band.

a descendant. The government further concedes that hunting and fishing rights were recognized or created by the Congressional Act of May 5, 1864 (13 Stat. 63) as noted in *Felter*, 546 F.Supp. at 1011. The government also concedes that such rights were not abolished by the Ute Termination Act, and that they continue to exist as *personal rights in the terminated mixed-blood Utes* whose names were on the final rolls. The government contends, however, that such hunting and fishing rights do not exist in the descendants of terminated mixed-blood Utes.

Defendant urges this court to follow cases from the Ninth Circuit which had to do with treaty rights of withdrawn members of the Klamath Indian Tribe to hunt and fish on Indian lands, which rights were judicially recognized as "rights of the individual Indians." *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019, 95 S.Ct. 491, 42 L.Ed.2d 292 (1974) and *Kimball v. Callahan* 590 F.2d 768 (9th Cir.) *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979), citing the Supreme Court case of *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 181, 93 S.Ct. 1257, 1267, 36 L.Ed.2d 129 (1973) in its interpretation of the Klamath Termination Act. These cases do not apply here, because we are here confronted with a different Termination Act—the Ute Termination Act—and rights which were transferred by the Ute Bands and established in the Ute Indian Tribe. Under the applicable proclamation concerning hunting and fishing rights, neither terminated mixed-blood Utes nor their descendants may hunt or fish on Tribal lands without a permit.[15]

Under generally recognized tribal law principles, communal rights and property do not descend to non communal children as heirs. In this regard, the Court of Claims stated in *Journeycake v. Cherokee Nation*, 28 Ct.Cl. 281, 302, 1800 WL 1921 (1893) *affirmed*, [155 U.S. 196, 15 S.Ct. 55, 39 L.Ed. 120 (1894)]:

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[15] See fn. 10, *supra*, and discussion relating thereto.

> The distinctive characteristic of [tribal] communal property is that every member of the community is an owner of it as such. He does not take it as heir, or purchased, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; . . . and his children after him will enjoy all that he has enjoyed, not as heirs but as communal owners.

This principle is underscored in F. Cohen, Handbook of Federal Indian Law 185 (1942 ed.). The principle is extensively discussed in *Felter* wherein the Supreme Court decision of *Gritts v. Fisher*, 224 U.S. 640, 32 S.Ct. 580, 56 L.Ed. 928 (1912) is quoted and relied upon as part of the underpinning for Judge Jenkins' conclusion that the hunting and fishing privilege within the Ute reservation is a personal right of user, "neither inheritable nor transferable." [16]

Under the Ute Indian Tribe Constitution, all prior rights were to be exercised by the "people of the Uintah and

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[16] Judge Jenkins in *Felter* went on to say:

> This is wholly consistent with the letter and policy of the Ute Termination Act. The aggregate fish and game entitlement of the mixed-blood Utes will never exceed an approximate 27% share of the harvestable fish or game for the simple reason that the mixed-bloods represented no more than that percentage of the entitled group. Attrition will eventually extinguish the mixed-blood entitlement through the normal course of events. This is an equitable distribution of the rights involved. Ultimately the interests of the mixed-bloods in those rights will be ended. Recalling that the thrust of termination was to end federal *supervision* of Indian assets, not to extinguish the Indians' rights without just compensation, the continuing right of user concept accomplished that end without incurring inequities, administrative complications, or liability under the Fifth Amendment. . . . The continuing right of user concept . . . protects tribal authority over its own hunting and fishing rights and allows for uniform regulation of their exercise. Those who are entitled to such a right are readily identified from the published final mixed-blood roll.

Felter at 1021-25.

Ouray Reservation." [17] By the time defendant was born, the Uintah Band of Ute Indians in effect had sold half of their pre-existing rights in and to "the use and occupancy of the (Uintah) Reservation," which included hunting and fishing rights, to the Whiteriver Band of Utes in settlement of claims.[18] In any event, by the time defendant was born hunting and fishing rights had become vested in the Ute Indian Tribe to be exercised by tribal members and terminated mixed-blood Utes whose names weer on the final roll. The transition from separate Bands into the Ute Indian Tribe was noted by the Tenth Circuit as having been accomplished in 1950:

> Pursuant to the I[ndian] R[eorganization] A[ct], the Uintah, White River, and Uncompahgre bands formed the Ute Indian Tribe of the Uintah and Ouray Reservation in 1937. . . .

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[17] The Preamble of the Ute Indian Tribe Constitution adopted in 1937 recites that the Ute Indian Tribe was formed by Ute Indians of the Three Bands "in order to establish a more responsible tribal organization, promote the general welfare," etc. Article II defines membership of the Ute Indian Tribe, and Article VI, Section 4 provides:

> *Reserved powers.*—Any rights and powers heretofore vested in the Tribe or bands of the Uintah and Ouray Reservation but not expressly referred to in this Constitution shall not be abridged by this article, but may be exercised by the people of the Uintah and Ouray Reservation through the adoption of appropriate By-laws and constitutional amendments.

[18] Finding in support of settlement. In *Uintah Ute Indians of Utah v. United States*, Indian Cl. Comm. Docket 45 (1957) the Indian Claims Commission held that the government was liable to the Uintah Utes for having deprived them of an undivided half of the lands of the Uintah Reservation because of the relocation onto the Reservation of the Whiteriver Band of Utes from Colorado. This and another claim against the United States was settled in 1960 by payment to the Uintahs of $7.7 million as settlement of claims, "and all matters involved in them." By reason of this settlement, the Uintah Band's prior exclusive rights to hunt and fish on the reservation were paid for, and the rights became non-exclusive.

> Thereafter, in June 1950, representatives of the members of the Uncompahgre, White River, and Uintah Bands signed a series of five tribal resolutions which completed the transition, which began with the constitution, from loosely-knit bands to unified Ute Tribe. *Hackford v. Babbitt*, 14 F.3d 1457, 1461 (10th Cir.1994).

The Tenth Circuit more recently has recognized that the Ute Termination Act not only removed governmental obligations and tribal status of terminated mixed-blood Ute Indians, but also of their descendants. In *Gardner v. United States*, 25 F.3d 1056, 1994 WL 170780 (10th Cir. (Utah)), the court stated:

> Section 677v [of the Ute Termination Act] does not expressly provide that federal supervision over descendants of terminated mixed-blood Utes is terminated. Our examination of the intent of the Act, as well as some of its other provisions, however, convinces us that this was the congressional intent.
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> . . . *We can discern no reason why Congress would have intended that this policy [of termination] apply only to Indians who were living as of August 27, 1954, but not to their descendants.* (Emphasis added)

This court holds that defendant has no right to hunt and fish on tribal lands by reason of his membership in or as a descendant of members of the Uintah Band of Indians.

Hunting and Fishing Rights of Terminated Mixed-Blood Utes May Not Be Inherited

As a general principle of law concerning property rights of tribal members, such are personal rights which cannot be transferred or inherited:

> [T]he member's interest in the land is only derivative of membership. There is no jurisdiction to se-

> cure partition of the tribal estate. *The member's interest in the tribal property is personal and can be transferred or inherited only to the extent that tribal law allows use rights to be transferred. Heirs will participate in the tribal property in their own right only if they are members of the tribe.*[19] (Emphasis added)

In *United States v. Felter*, 752 F.2d 1505, 1512 (10th Cir.) the Tenth Circuit held that the Ute Termination Act did not abrogate tribal hunting and fishing rights of the mixed-blood Indians who were thereby terminated. However, Judge Jenkins described the personal nature of the right as follows:

> Individual mixed-blood Utes enrolled upon the final mixed-blood Roll (and still living) are thus entitled to hunting and fishing privileges within the Ute reservation equivalent to those afforded members of the tribe as now defined [i.e., full-blood Utes]. *As each of the mixed-blood Utes passes away, his or her personal right of user is extinguished, it being neither inheritable nor transferable.* (Emphasis added)

United States v. Felter, 546 F.Supp. at 1025. Judge Jenkins further underscored the noninheritable rights of children of the terminated mixed-bloods:

> The children of persons listed on the mixed-blood roll would *not* enjoy the entitlement had by their parents. If they are to exercise any such tribal right that may occur only through direct affiliation with the tribe as members. F. Cohen, Handbook of Federal Indian Law 185 (1942 ed.). *Felter*, n. 52.

This court agrees.

What was dicta in that case is adopted as a holding in this case as to the defendant. This court considers that children of Terminated Utes including defendant herein

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[19] Cohen, *Handbook of Federal Indian Law* 606.

do not inherit the right to hunt and fish on tribal lands from their parents who had personal rights to hunt and fish therein.

Constitutionality of Ute Termination Act—In General

The authority of Congress to determine and define the relationship of the government with Indian Tribes and peoples exists as a part of the power to regulate commerce: "[S]uch regulation is rooted in the unique status of the Indians as a 'separate people' with their own political institutions." *United States v. Antelope*, 430 U.S. 641, 646, 97 S.Ct. 1395, 1399, 51 L.Ed.2d 701 (1977). The Ute Termination Act repeatedly has been held to be constitutional. *See, Affiliated Ute Citizens v. United States*, 406 U.S. 128, 143-145, 92 S.Ct. 1456, 1467-68, 31 L.Ed.2d 741 (1972) (the Ute Termination Act is within the power of Congress); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Probst*, 428 F.2d 491, 498 (10th Cir.1970), *cert. denied*, 400 U.S. 926, 91 S.Ct. 189, 27 L.Ed.2d 186 (1970) (Ute Termination Act is not arbitrary or capricious discrimination in violation of the Fifth Amendment); *Chapoose v. Hodel*, 831 F.2d 931, 934 (10th Cir.1985) (following rationale of Probst).

The Ninth Circuit adopted the analysis of *Affiliated Utes* in *Poletti v. Internal Revenue Service*. That court rejected constitutional challenges to the Ute Termination Act, stating:

> "Because the Supreme Court has found the UPA [Ute Partition and Termination Act] and the formation of the UDC [Ute Distribution Corporation] constitutional, Petitioner's additional arguments are unpersuasive. . . ." The Supreme Court has held that "(a) UDC was lawfully created, (b) UDC is the authorized representative of the mixed-bloods under the partition act, (c) the termination procla-

> mation ended all federal supervision and trust relationships with respect to the UDC shares." 34 F.3d 742, 748 n. 11 (9th Cir.1994) (citations omitted).

In *Affiliated Utes*, although the Supreme Court did not explicitly deal with the constitutionality of the Ute Termination Act, it is implicit in the Court's analysis that the Act is constitutional.[20]

The Ute Termination Act does not Constitute Invidious Racial Discrimination

In furtherance of its plenary power, Congress has determined that tribal membership as well as termination of tribal membership may be determined by reference to Indian blood. In this regard, the court noted in *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808, 813-14 (E.D.Wash. 1965), that:

> *Congress in legislation has not hesitated to place full-blood Indians in one class and all others in another, giving one class more rights than the other.* (Emphasis added.)

The Ute Constitution uses a blood based method to determine tribal membership status. *See*, Ute Const. art. II § 1. The constitutionality of a blood based determination is supported by case law. *See Simmons v. Eagle Seelatsee*, 244 F.Supp. 808, 813-814 (E.D.Wash. 1965) (blood based membership method for Yakima Indian

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[20] *Affiliated Utes* involved the illegal transfer of shares of stock under the securities laws issued to mixed-blood Utes. In that case the Supreme Court set forth an exhaustive analysis of the Ute Termination Act. The bona fide existence and actions of the Ute Distribution Corporation (the corporation set up by the mixed-bloods to manage their share of the undivided assets of the tribe) were challenged as illegal and unconstitutional. The Supreme Court said: "UDC's formation and structure were contemplated by the [Termination] Act, and the AUC itself created and breathed life and vigor into UDC. All this was within Congress' power." 406 U.S. at 144, 92 S.Ct. at 1467.

Tribe did not violate U.S. Constitution). *See also, Tabbee v. United States*, 30 Fed.Cl. 1 (1993) (discussing the Ute Termination Act saying that rights based on parentage "[are] an inevitable effect of recognizing fundamental rights in tribal groups as well as individuals.").

Termination of Federal Status as Indians does not Violate Due Process of Law

With respect to termination of tribal membership status as to the Ute Indian Tribe, the Tenth Circuit in *Ute Indian Tribe of the Uintah and Ouray Reservation v. Probst*, 428 F.2d 491, 498 (10th Cir.), *cert. denied*, 400 U.S. 926, 91 S.Ct. 189, 27 L.Ed.2d 186 (1970), noted that the legislative history of the Ute Termination Act showed "that the mixed-bloods desired termination of federal supervision," while the full-blood Indians believed they were not ready for termination, and held that the Ute Termination Act did not violate the due process rights of mixed-blood Utes under the United States Constitution:

> In the case at bar the classification into the two groups was supported by the Indians, was relevant to the purposes of the legislation, and had a reasonable basis. *We find no arbitrary or capricious discrimination which violates Fifth Amendment due process.*

Probst at 498. (emphasis added). Similarly, in *Chapoose v. Hodel*, 831 F.2d 931, 934 (10th Cir.1987), the Tenth Circuit held that the Ute Termination Act does not violate the Fifth Amendment Due Process Clause of the Constitution.

Moreover, defendant was not alive at the time the Ute Termination Act was passed (1954) or when the Termination Proclamation was made (1961). Accordingly, defendant Murdock was not "terminated" since he was not a mixed-blood Ute whose name was on the final roll. Since he was yet unborn when the Ute Termination Act became law, he had no right to notice or a hearing there-

under. In all events, the Act provides constitutionally adequate due process protections, including circulation in a newspaper and an appeals process which has been utilized by several individuals to successfully appeal their status. Other suggested bases for challenge to the constitutionality of the Ute Termination Act are likewise rejected by this court.[21]

Bifurcation

This court considers that it would be unworkable and an unnecessariy duplication of judicial time and resources to bifurcate the various issues which have been raised and asserted as defenses by defendant. Accordingly, the Motion to Bifurcate should be denied.

Based upon the foregoing, it is hereby

ORDERED, that the government's Motion to Determine Status is GRANTED in accordance with the opinion

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[21] It is urged that the Ute Termination Act violates freedom of the right of association, and constitutes interference with participation in the political process. However, there is no proscription in the Act against joining in any sort of intimate association. In this regard, the tribe does not meet the level of an intimate association under *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). In any event, Murdock never applied for membership in the tribe and the Ute Tribe has the right to set its own membership requirements. Non-membership in a group that a person has never applied to join, is not a violation of her right to freely associate. There is no issue of political process since defendant chose to avail himself of the regulations applicable to hunting and fishing on reservation lands.

Murdock makes no claim of personal deprivation of freedom of religion but attempts to assert the rights of another. There is nothing in the record before the court that would indicate Murdock was constitutionally deprived of his religious freedom.

In suggesting that the Act constitutes a bill of attainder Murdock has not established any punitive intent nor is any said punitive intent evidenced by the enactment of the Ute Termination Act. Such is the prerequisite of *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-47, 104 S.Ct. 3348, 3351-52, 82 L.Ed.2d 632.

set forth herein. The court will hear arguments of counsel as to whether any further evidentiary or other proceedings are necessary relative to this matter; it is

FURTHER ORDERED, that defendant's Motion to Dismiss is DENIED; it is

FURTHER ORDERED, that defendant's Motion to Bifurcate issues is DENIED.

The parties are to appear at a status conference on March 18, 1996 at 9:30 a.m. for a trial setting. The court understands that defendant has waived the applicability of the Speedy Trial Act and the computation of time thereunder. In any event all time under the Speedy Trial Act is excluded from the date the motions were filed until such are finally determined.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-4150

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PERRY VON MURDOCK,
Defendant-Appellant,

ORDER ON PETITION FOR REHEARING
Filed December 22, 1997

Before SEYMOUR, Chief Judge, PORFILIO and BALDOCK, Circuit Judges.

Defendant-Appellant Perry Von Murdock's petition for rehearing is DENIED. Furthermore, the Court has made some revisions to the opinion published on October 20, 1997. The revisions have been made for clarification. Therefore, the Court will issue today a revised opinion *nunc pro tunc* to October 20, 1997, and the opinion published on October 20, 1997, is withdrawn.

Entered for the Court

PATRICK FISHER
Clerk

APPENDIX D

UTE TERMINATION ACT

UTE INDIANS OF UTAH: DISTRIBUTION OF ASSETS BETWEEN MIXED-BLOOD AND FULL-BLOOD MEMBERS; TERMINATION OF FEDERAL SUPERVISION OVER PROPERTY OF MIXED-BLOOD MEMBERS

The purpose of this Act [25 USCS § 677 et seq.] is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property.

Other provisions:

Repeal of inconsistent laws. Act Aug. 27, 1954, ch 1009, § 29, 68 Stat. 879, provided: "All Acts or parts of Acts, inconsistent with this Act [25 USCS § 677 et seq.] are hereby repealed insofar as they affect the tribe or its members.".

Separability. Act Aug. 27, 1954, ch 1009, § 30, 68 Stat. 879, provided: "If any provision of this Act [25 USCS § 677 et seq.], or the application thereof to any person or circumstance, is held invalid, the remainder of the Act [25 USCS § 677 et seq.] and the application of such provision to other persons or circumstances shall not be affected thereby.".

§ 677a. *Definitions.*

For the purposes of this Act [25 USCS § 677 et seq.]—

(a) "Tribe" means the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah.

(b) "Full-blood" means a member of the tribe who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice under the provisions of section 4 hereof [25 USCS § 677c].

(c) "Mixed-blood" means a member of the tribe who does not possess sufficient Indian or Ute blood to fall within the full-blood class as herein defined, and those who become mixed-bloods by choice under the provisions of section 4 hereof [25 USCS § 677c].

(d) "Secretary" means Secretary of the Interior.

(e) "Superintendent" means the Superintendent of the Uintah and Ouray Reservation, Utah.

(f) "Asset" means any property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe, or subject to a restriction against alienation imposed by the United States.

(g) "Adult" means a member of the tribe who has attained the age of twenty-one years.

§ 677b. *Method of determining Ute Indian blood.* For the purposes of this Act [25 USCS §§ 677 et seq.] Ute Indian blood shall be determined in accordance with the constitution and bylaws of the tribe and all tribal ordinances in force and effect on the effective date of this Act [enacted Aug. 27, 1954.]

§ 677c. Transfers of members from full-blood roll to mixed-blood group; time; certification by Secretary. Any member of the tribe whose name appears on the proposed roll of full-blood members as provided in section 8 hereof [25 USCS § 677g] and any person whose name is added to such proposed roll as the result of an appeal to the Secretary may apply to the Superintendent to become identified with and a part of the mixed-blood group: Provided, That such application is made within thirty days

subsequent to the publication of such proposed roll in the event of an appeal within thirty days subsequent to notification of the decision on said appeal: And provided further, That before such transfer is made upon the official rolls the Secretary shall first certify that, in his opinion, such change in status is not detrimental to the best interest of the person seeking such change.

§ 677d. *Restriction of tribe to full-blood members after publication of final rolls; non-interest of mixed-blood members; new membership.* Effective on the date of publication of the final rolls as provided in section 8 hereof [25 USCS § 677g] the tribe shall thereafter consist exclusively of the full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this Act [25 USCS §§ 677 et seq.]. New membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder.

§ 677e. *Organization of mixed-blood members; constitution and bylaws; representatives; actions in absence of organization.* The mixed-blood members of the tribe, including those residing on and off the reservation, shall have the right to organize for their common welfare, and may adopt an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary under such rules and regulations as he may prescribe. Such constitution may provide for the selection of authorized representatives who shall have power to take any action that is required by this Act [25 USCS §§ 677 et seq.] to be taken by the mixed-blood members as a group: Provided, That nothing herein contained shall be construed as requiring said mixed-blood Indians to so organize if such organization is by them deemed unnecessary. In the event no such approved organization is effected, any action taken by the adult mixed-blood members, by majority vote, whether

in public meeting or by referendum, but in either event, after such notice as may be prescribed by the Secretary, shall be binding upon said mixed-blood members of the tribe for the purposes of this Act [25 USCS §§ 677 et seq.]

§ 677f. *Employment of legal counsel for mixed-blood members; fees.* The mixed-blood members of the tribe as a group may employ legal counsel to accomplish the legal work required on behalf of said group under the terms of this Act [25 USCS §§ 677 et seq.], and for any other purpose by them deemed necessary or desirable; the choice of counsel and fixing of fees to be subject to the approval of the Secretary until Federal supervision over all of the members of said group and their property is terminated in the manner provided in section 16 of this Act [25 USCS § 677o].

§ 677g. *Membership rolls of full-blood and mixed-blood members; preparation and initial publication; appeal from inclusion or omission from rolls; finality of determination; final publication; inheritable interest; future membership.* The tribe shall have a period of thirty days from the date of enactment of this Act [enacted Aug. 27, 1954] in which to prepare and submit to the Secretary a proposed roll of the full-blood members of the tribe, and a proposed roll of the mixed-blood members of the tribe, living on the date of enactment of this Act [enacted Aug. 27, 1954]. If the tribe fails to submit such proposed rolls within the time specified in this Act [25 USCS §§ 677 et seq.], the Secretary shall prepare such rolls for the tribe. Said proposed rolls shall be published in the Federal Register, and in a newspaper of general circulation in each of the counties of Uintah and Duchesne in the State of Utah. Any person claiming membership rights in the tribe, or an interest in its assets, or a representative of the Secretary on behalf of any such person, within sixty days from the date of publication in the Federal Register, or in either of the papers of general circu-

lation, as hereinbefore provided, whichever publication date is last, may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from either of such proposed rolls. The Secretary shall review such appeals and his decisions thereon shall be final and conclusive. After disposition of all such appeals to the Secretary, and after all transfers have been made pursuant to section 4 hereof [25 USCS § 677c] the roll of the full-blood members of the tribe, and the roll of the mixed-blood members of the tribe, shall be published in the Federal Register, and such rolls shall be final for the purposes of this Act [25 USCS §§ 677 et seq.], but this Act [25 USCS §§ 677 et seq.] shall not be construed as granting any inheritable interest in tribal assets to full-blood members of the tribe or as preventing future membership in the tribe, after the date of enactment of this Act [enacted Aug. 27, 1954], in the manner provided in the constitution and bylaws of the tribe.

§ 677h. *Sale or other disposition of certain described lands; funds; relief of United States from liability; assigned lands.* The business committee of the tribe for and on behalf of the full-blood member of said tribe, and the duly authorized representatives for the mixed-blood members of said tribe, acting jointly, are hereby authorized, subject to the approval of the Secretary, to sell, exchange, dispose of, and convey to any purchaser deemed satisfactory to said committee and representatives, any or all of the lands of said tribe described as follows, to wit:

(LAND TABLES OMITTED)

All such sales, exchanges, or other dispositions shall be made upon such terms as said committee and said authorized representatives shall deem satisfactory and may be made pursuant to bids or at private sale, and all funds or other property derived from such sales, exchanges, or other dispositions shall be subject to the terms of this

Act [25 USCS §§ 677 et seq.]. Consent by the tribal business committee and said authorized representatives to the sale, exchange, or other disposal of the lands herein described shall relieve the United States of any liability resulting from such sale, exchange, or other disposition. The tribal business committee and said authorized representatives are further authorized to sell or dispose of tribal assigned lands to the assignees thereof under such terms and conditions as may be agreed upon by the said tribal business committee and said authorized representatives with the assignees, subject, however, to the approval of the Secretary.

§ 677i. *Division of assets; basis; prior alienation or encumbrance; partition by Secretary upon nonagreement; assistance; management of claims and rights; division of net proceeds; applicability of usual processes of the law to originally owned stock of corporate representative and to corporate distributions.* The tribal business committee repreenting the full-blood group, and the authorized representatives of the mixed-blood group, within sixty days after the publication of the final membership roll, as provided in section 8 hereof [25 USCS § 677g], shall commence a division of the assets of the tribe that are then susceptible to equitable and practicable distribution. Such division shall be by agreement between them subject to the approval of the Secretary. Said division shall be based upon the relative number of persons comprising the final membership roll of each group. After such division the rights or beneficial interests in tribal property of each mixed-blood person whose name appears on the roll shall constitute an undivided interest in and to such property which may be inherited or bequeathed, but shall be subject to alienation or encumbrance before the transfer of title to such tribal property only as provided herein. Any contract made in violation of this section shall be null and void. If said groups are unable to agree upon said division within a period of twelve months from the date of

such commencement, or any authorized extension of said period granted within the discretion of the Secretary, the Secretary is authorized to partition the assets of the tribe in such manner as in his opinion will be equitable and fair to both groups. Such partition shall give rise to no cause of action against the United States and the costs of such partition shall be paid by the tribe. The Secretary is authorized to provide such reasonable assistance as may be requested by both groups, or by either group, in formulation and execution of a plan for the division of said assets, including necessary technical services of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah, and political subdivisions thereof, and members of the tribe. All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law, and the net proceeds therefrom after deducting the costs chargeable to such maangement shall first be divided between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of such proceeds.

The stock of any corporation organized by the mixed-blood group for the purpose of empowering the officers of such corporation to act as the authorized representatives of said mixed-blood group in the joint management with the tribe and in the distribution and [of] unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible and practicable distribution shall

not be subject to mortgage, pledge, hypothecation, levy, execution, attachment or other similar process, while such stock remains in the ownership of the original stockholder or his heirs or legatees, but the interest of stockholders in any distribution by such corporation shall be subject to the usual processes of the law.

§ 677j. *Advances or expenditures from tribal funds; restrictions on mixed-blood group until adoption of plan for terminating supervision.* Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter deposited in the United States Treasury to the credit of the tribe or either group thereof, shall be available for advance to the tribe or the respective groups, or for expenditure, for such purposes, including per capita payments, as may be designated by the Tribal Business Committee for the full-blood members, and by the authorized agents of the mixed-blood members, and in either event subject to the approval of the Secretary: Provided, That the aggregate amount of the expenditures and advances authorized by this section for the mixed-blood group shall not exceed 50 per centum of the total funds of said mixed-blood group after such division, until said mixed-blood group has adopted a plan approved by the Secretary for termination of Federal suervision of said mixed-blood group, as required under section 13 hereof [25 USCS § 6771]. After such termination of Federal supervision, per capital payments to the mixed-blood group shall not be subject to approval of the Secretary.

§ 677k. *Adjustment of debts in making per capita payments to mixed-blood members; execution of mortgages on property.* Fifty per centum payments to any individual mixed-blood member made pursuant to any division or distribution hereunder shall have deducted therefrom any sum or sums of money owed by such member to the tribe, whether due or to become due, unless in the opinion of the Secretary said debts are not adequately secured in which event the entire per capita payment shall be subject

to such offset. Any other division, partition or distribution of property to any individual mixed-blood member made pursuant to this Act [25 USCS §§ 677 et seq.] shall be subject to a mortgage to be made in favor of the tribe securing the payment of all sums of money owed by him to the tribe on the date of such division, partition or distribution to such individual mixed-blood member. The Secretary shall require the execution of any mortgage required hereunder as a condition to any such division, partition or distribution.

§ 677l. *Distribution to individual members of mixed-blood group; preparation and approval of plan; assistance; provisions permitted in plan.* After the adoption of a plan for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof shall be prepared and ratified by a majority of said group, within the period of six months from such adoption and presented to the Secretary for approval. The Secretary is authorized to provide such reasonable assistance, including necessary technical service of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah and political subdivisions thereof, as may be required by the mixed-blood group in the preparation of such plan.

The plan for division of the assets among members of the mixed-blood group may include:

(1) Complete disposition of all cash assets of said group, reserving, however, sufficient funds to cover—

(i) the proportionate share of said mixed-blood group in and to all expenses incurred in effecting the purposes of this Act [25 USCS §§ 677 et seq.], including, but not limited to, the necessary expense incurred under sections 13 and 14 of this Act [this section and 25 USCS § 677m];

(ii) the just and proportionate share of the mixed-bloods in the expense incurred in the prosecution of the

claims of the tribe, or the bands thereof, against the United States; and

(iii) the determinable and estimated administrative costs and expenses of any mixed-blood organization authorized by this Act [25 USCS §§ 677 et seq.], including lawful and reasonable salaries and fees of authorized agents, officers and employees of said mixed-blood group.

(2) Partition of the lands of the mixed-blood group, excepting all gas, oil, and mineral rights, to corporations, partnerships, or other legal entities, and to trustees, and the individual members of said groups, quality and quantity relatively considered, according to the respective rights and interests of the parties, located so as to embrace, as far as practicable, any improvements lawfully made by the person or persons receiving such land. The value of the improvements made, under a valid lease or assignment from the tribe, shall be excluded from the valuation in making allotments to the lessee or assignee, and the land must be valued without regard to such improvements unless the lease or assignment, under which said improvements were made, provided that such improvements should become the property of the tribe. In the making of any partition due consideration shall be given to all of the rights and interests of the person or persons receiving the property, and all of the rights and interests of the other members of the tribe. Two or more of the members of said mixed-blood group may obtain their share of property as tenants in common, as joint tenants, or in any other lawful manner when such members agree among themselves as to the maner in which they desire to receive such title. When it appears that an equitable partition cannot be made among the members of said mixed-blood group without prejudice to the rights and interests of some of them, and yet a partition is directed by the group, the members of said group may voluntarily determine compensation to be made by one party to another on account of the inequity. In all cases where equity is agreed upon by the members of said mixed-blood group, such compensatory

adjustment among the parties, according to the principles of equity, must be approved by the Secretary. In the event of a failure to agree upon an equitable compensatory adjustment among the parties the Secretary shall make such adjustment and his decision shall be final.

(3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in proportion to their interests in the assets of such corporations. When, in the opinion of said mixed-blood group, it is to the best interest of said group to transfer a portion of the assets of said group to a corporation or other legal entity for any purpose, the Secretary is authorized to make such transfer.

(4) A transfer of assets to one or more trustees designated by said group who shall hold title to all or any part of the property of said group for management or liquidation purposes under terms and conditions prescribed by said mixed-blood group. The Secretary is authorized to make such transfer, and approve the trustees, and the terms and conditions of the trust.

(5) Sale of any portion of the assets of said group subject to the approval of the Secretary. In addition to the sales herein otherwise authorized, authority is granted to the authorized representatives of said group to sell any property of said group when, in the opinion of the majority of said mixed-blood group, a practicable partition cannot be made, or for any other reason it is deemed to the best interests of the group, and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group;[,] after deducting reasonable cost of sale and distribution.

§ 677m. *Procedure by Secretary if distribution not completed within seven years from August 27, 1954.* In the event all the tribal assets, susceptible to equitable and practicable distribution, distributed to the mixed-blood group under the provisions of section 10 hereof [25

USCS § 677i], are not, within seven years from the date of enactment of this Act [enacted Aug. 27, 1954], distributed to the individual mixed-blood members as contemplated in the plan to be adopted in accordance with the provisions of section 13 hereof [25 USCS § 677l], so as to effectively terminate Federal supervision over said assets, then the Secretary shall proceed to make such distribution in a manner, in his discretion, deemed fair and equitable to all members of said group, or convey such assets to a trustee for liquidation and distribution of the net proceeds, or convey such assets to the persons entitled thereto as tenants in common.

§ 677n. *Disposal by mixed-blood members of their individual interests in tribal assets; requisites and conditions.* Any member of the mixed-blood group may dispose of his interest in the tribal assets prior to termination of Federal supervision, subject to the approval of the Secretary. In the event a member of the mixed-blood group determines to dispose of his interest in any of said real property at any time within ten years from the date of enactment of this Act [enacted Aug. 27, 1954], he shall first offer it to the members of the tribe, and no sale of any interest, prior to termination of Federal supervision, shall be authorized without such offer to said members of the tribe in such form as may be approved by the Secretary. After termination of Federal supervision the requirement of such offer, in form to be approved by the Secretary, shall be a covenant to run with the land for said ten-year period, and shall be expressly provided in any patent or deed issued prior to the expiration of said period.

§ 677o. *Termination of restrictions on individually owned property of the mixed-blood group.* (a) Transfer of control of trust property; removal of sales restrictions. When any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group under the provisions of section 10 hereof [25 USCS § 677i], whether such distribution is

made in part or in whole to a corporation, partnership, or trusteeship in which he is interested, or otherwise, the Secretary is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States, and shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated, except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of this Act [25 USCS §§ 677 *et seq.*], notwithstanding anything herein contained to the contrary.

(b) Partition or sale by Secretary prior to removal of restrictions. Prior to the removal of restrictions in accordance with the provisions of subsection (a) hereof on land owned by more than one person, the Secretary may—

(1) upon request of any of the owners, partition the land and issue to each owner an unrestricted patent or deed for his individual share, unless such owner is a full-blood member of the tribe or other Indian who owns trust or restricted property, in which event a trust patent or restricted deed shall be issued and such trust may be terminated or such restrictions may be removed when the Secretary determines that the need therefor no longer exists;

(2) upon request of any of the owners and a finding by the Secretary that partition of all or any part of the land is not practicable, cause all or any part of the land to be sold at no less than the appraised value thereof and distribute the proceeds of sale to the owners: Provided, That before a sale any one or more of the owners may elect to purchase the other interests in the land, or the tribe may elect to purchase the entire interest in the land, at not less than the appraised value thereof.

§ 677p. *Tax exemption; exceptions and time limits; valuation for income tax on gains or losses.* No distribution of the assets made under the provisions of this Act [25 USCS §§ 677 et seq.] shall be subject to any Federal or State income tax: Provided, That so much of any cash distribution made hereunder as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of this Act [25 USCS §§ 677 et seq.] be exempt from individual income tax in the hands of the recipients for the year in which paid. Property distributed to the mixed-blood group pursuant to the terms of this Act shall be exempt from property taxes for a period of seven years from the date of enactment of this Act [enacted Aug. 27, 1954], unless the original distributee parts with the title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance: Provided, That the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section. After seven years from the date of the enactment of this Act [enacted Aug. 27, 1954], all property distributed to the mixed-blood members of the tribe under the provisions of this Act [25 USCS §§ 677 et seq.], and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to this Act [25 USCS §§ 677 et seq.].

§ 677q. *Applicability of decedents' estates laws to individual trust property of mixed-blood members.* The laws of the United States with respect to probate of wills, determination of heirship, and the administration of estates shall apply to the individual trust property of mixed-blood members of the tribe until Federal supervision is terminated. Thereafter, the laws of the several States, Territories, possessions, and the District of Columbia within which such mixed-blood members reside at the time of their death shall apply.

§ 677r. *Indian claims unaffected.* Nothing in this Act [25 USCS §§ 677 et seq.] shall affect any claim heretofore filed against the United States by the tribe, or the individual bands comprising the tribe.

§ 677s. *Valid leases, permits, liens, etc., unaffected.* Nothing in this Act [25 USCS §§ 677 et seq.] shall abrogate any valid lease, permit, license, right-of-way, lien, or other contract heretofore approved.

§ 677t. *Water rights.* Nothing in this Act [25 USCS §§ 677 et seq.] shall abrogate any water rights of the tribe or its members.

§ 677u. *Protection of minors, persons non compos mentis, and other members needing assistance; guardians.* For the purposes of this Act [25 USCS §§ 677 et seq.], the Secretary shall protect the rights of members of the tribe who are minors, non compos mentis, or, in the opinion of the Secretary, in need of assistance in conducting their affairs, by such means as he may deem adequate, but appointment of guardians pursuant to State laws, in any case, shall not be required until Federal supervision has terminated.

§ 677v. *Termination of Federal trust; publication; termination of Federal services; application of Federal and State laws.* Upon removal of Federal restrictions on the property of each individual mixed-blood member of the tribe, the Secretary shall publish in the Federal Register

a proclamation declaring that the Federal trust relationship to such individual is terminated. Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian. All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated, and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction.

§ 677w. *Presentation of development program for full-blood group to eventually terminate Federal supervision.* Within three months after the date of enactment of this Act [enacted Aug. 27, 1954], the business committee of the tribe representing the full-blood group thereof shall present to the Secretary a development program calculated to assist in making the tribe and the members thereof self-supporting, without any special Government assistance, with a view of eventually terminating all Federal supervision of the tribe and its members.

§ 677x. *Citizenship status unaffected.* Nothing in this Act [25 USCS §§ 677 et seq.] shall affect the status of the members of the tribe as citizens of the United States.

§ 677y. *Execution by Secretary of patents, deeds, etc.* The Secretary shall have authority to execute such patents, deeds, assignments, releases, certificates, contracts, and other instruments, as may be necessary or appropriate to carry out the provisions of this Act [25 USCS §§ 677 et seq.], or to establish a marketable and recordable title to any property disposed of pursuant to this Act [25 USCS §§ 677 et seq.].

§ 677z. *Rules and regulations; tribal or group referenda.* The Secretary is authorized to issue rules and regulations necessary to effectuate the purposes of this Act [25 USCS §§ 677 et seq.], and may, in his discretion, provide for tribal or group referenda on matters pertaining to management or disposition of tribal or group assets.

§ 677aa. *Procedure by Secretary upon non-agreement between mixed-blood and full-blood groups.* Whenever any action pursuant to the provisions of this Act [25 USCS §§ 677 et seq.] requires the agreement of the mixed-blood and full-blood groups and such agreement cannot be reached, the Secretary is authorized to proceed in any manner deemed by him to be in the best interests of both groups.

APPENDIX E

CONSTITUTION AND BY-LAWS OF THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

PREAMBLE

We, the Ute Indians of the Uintah, Uncompahgre and Whiteriver Bands hereafter to be known as the Ute Indian Tribe of the Uintah and Ouray Reservation, in order to establish a more responsible tribal organization, promote the general welfare, encourage educational progress, conserve and develop our lands and resources, and secure to ourselves and our posterity the power to exercise certain rights of home rule, not inconsistent with the Federal, State and local laws, do ordain and establish this Constitution for the Ute Indian Tribe of the Uintah and Ouray Reservation.

Article I—Territory

The Jurisdiction of the Ute Indian Tribe of the Uintah and Ouray Reservation shall extend to the territory within the original confines of the Uintah and Ouray Reservation as set forth by Executive Orders of October 3, 1861 and January 5, 1882, and by the Acts of Congress approved May 27, 1902, and June 19, 1902, and to such other lands without such boundaries as may hereafter be added thereto under any law of the United States, except as otherwise provided by law.

Article II—Membership

Section 1. The membership of the Ute Indian Tribe of the Uintah and Ouray Reservation shall consist as follows:

(*a*) All persons of Indian blood whose names appear on the official census roll of the Ute Indian Tribe of the Uintah and Ouray Reservation as of July 1, 1935.

(*b*) All children born to any member of the Ute Indian Tribe of the Uintah and Ouray Reservation who is a resident of the Reservation at the time of the birth of said children.

Sec. 2. The Tribal Business Committee shall have the power to promulgate ordinances, subject to review by the Secretary of the Interior, covering future membership and the adoption of new members.

(*a*) No property rights shall be acquired or lost through membership in this organization except as provided hereing,

Article III—The Business Committee. .

Section 1. The governing body of the Ute Indian Tribe of the Uintah and Ouray Reservation shall be a business committee, known as the Uintah and Ouray Tribal Business Committee.

Sec. 2. The Tribal Business Committee shall consist of six members, two (2) members duly elected from each of the three (3) bands of the Ute Indian Tribe of the Uintah and Ouray Reservation, known as the Uintah, Uncompahgre and Whiteriver Bands.

Sec. 3. The members of the Tribal Business Committee shall be elected for a term of four (4) years, except at the first election, when one (1) member from each band shall be elected for a term of two (2) years; thereafter, their successors shall be elected for a term of four (4) years.

Sec. 4. The Tribal Business Committee, so organized, shall elect from within its own number (1) a chairman, (2) a vice-chairman; and from within or without, (3) a secretary, and (4) a treasurer, and such other officials and committees as may be deemed necessary.

Sec. 5. The first election of the Tribal Business Committee hereunder shall be called, held and supervised by

the present Tribal Business Committee within sixty (60) days after the ratification and approval of this Constitution.

The candidate from each band receiving the highest number of votes shall hold office for a term of four (4) years, and the candidate from each band receiving the next highest number of votes shall hold office for two (2) years; thereafter, every two (2) years a Tribal Business Committeeman shall be elected from each band to represent such bands for a term of four (4) years.

After the first election, elections for the Tribal Business Committee shall be called at least sixty (60) days prior to the expiration of the terms of office of the members of the Tribal Business Committee.

Article IV—Nominations and Elections

Section 1. Any member of the Ute Indian Tribe of the Uintah and Ouray Reservation twenty-one (21) years of age or over, who has maintained a legal residence on the Uintah and Ouray Reservation for a period of one (1) year preceding the election, shall be entitled to vote and hold office.

Sec. 2. Any legal voter is eligible to serve as a member of the Tribal Business Committee.

Sec. 3. All elections shall be by secret ballot and shall be held in accordance with rules and regulations prescribed by the Tribal Business Committee, or by an election board appointed by the Tribal Business Committee.

Article V—Vacancies and Removal From Office

Section 1. If a member of the Tribal Business Committee or an elective official shall die, resign, be removed or recalled from office, permanently leave the reservation, or be found guilty of a felony or misdemeanor involving dishonesty in any Indian, State or Federal court, the posi-

tion shall be declared vacant, at the discretion of the Tribal Business Committee, and they shall designate a time to hold a special election to fill the vacancy.

Sec. 2. The Business Committee may by four (4) affirmative votes, expel any member for neglect of duty or gross misconduct. Before any vote for expulsion is taken on the matter, such member or official shall be given a written statement of the charges against him at least five (5) days before the meeting of the Business Committee, before which he is to appear, and an opportunity to answer any and all charges at such designated Committee meeting. The decision of the Business Committee shall be final.

Sec. 3. Upon receipt of a petition signed by one-third of the eligible voters in any band calling for the recall of any member of the Committee representing said band, it shall be the duty of the Committee to call an election on such recall petition. No member may be recalled in any such election unless at least thirty percent of the legal voters of the band which he represents shall vote at such election.

Article VI—Powers of the Tribal Business Committee

Section 1. *Enumerated powers.*—The Tribal Business Committee of the Uintah and Ouray Reservation shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express retrictions upon such powers contained in this Constitution and By-laws, and subject to review by the Ute Bands themselves at any annual or special meeting:

(*a*) To negotiate with the Federal, State and local governments on behalf of the Tribe and to advise and consult with the representatives of the Interior Department on all activities of the Department that may affect the Ute Tribe.

(*b*) To employ legal counsel for the protection and advancement of the rights of the Ute Indian Tribe of the Uintah and Ouray Reservation, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

(*c*) To approve or veto any sale, disposition, lease or encumbrance of tribal lands, interest in tribal lands, or other tribal assets, which may be authorized or executed by the Secretary of the Interior, Commissioner of Indian Affairs, or any other official or agency of government, provided that no tribal lands shall ever be encumbered or sold, except for governmental purposes, or leased for a period exceeding five years, except that leases for mining purposes or on irrigable land may be made for such longer periods as may be authorized by law.

(*d*) To advise the Secretary of the Interior with regard to all appropriation estimates, or Federal projects, for the benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation prior to the submission of such estimates to the Bureau of the Budget and to Congress.

(*e*) To make assignments of reservation land to members of the Ute Indian Tribe of the Uintah and Ouray Reservation in conformity with Article VIII of this Constitution.

(*f*) To regulate all economic affairs and enterprises in accordance with the terms of a Charter that may be issued to the Ute Indian Tribe of the Uintah and Ouray Reservation by the Secretary of the Interior.

(*g*) To appropriate for salaries of tribal officials or other public purposes of the Tribe any available tribal funds, provided that any such appropriation made prior to July 1, 1940, shall be subject to review by the Secretary of the Interior.

(*h*) To levy taxes upon members of the Ute Indian Tribe of the Uintah and Ouray Reservation, and to re-

quire the performance of community labor in lieu thereof, and to levy taxes and license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the Reservation.

(*i*) To exclude from the territory of the Uintah and Ouray Reservation persons not legally entitled to reside therein, under ordinances which shall be subject to review by the Secretary of the Interior.

(*j*) To enact resolutions or ordinances, not inconsistent with Article II of this Constitution governing adoption and abandonment of members, and to keep at all times a correct roll of the members of the Ute Indian Tribe of the Uintah and Ouray Reservation.

(*k*) To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Ute Indian Tribe of the Uintah and Ouray Reservation, and providing for the maintenance of law and order and the administration of justice by establishing a Reservation Indian Court and defining its duties and powers.

(*l*) To safeguard and promote the peace, safety, morals and general welfare of the Ute Indian Tribe of the Uintah and Ouray Reservation by regulating the conduct of trade and the use and disposition of property upon the Reservation, provided that any ordinance directly affecting non-members of the Reservation shall be subject to review by the Secretary of the Interior.

(*m*) To charter subordinate organizations for economic purposes, and to regulate the activities of co-operative associations of members of the Ute Indian Tribe of the Uintah and Ouray Reservation by ordinance, provided that any such ordinance shall be subject to review by the Secretary of the Interior.

(*n*) To regulate the inheritance of property, real and personal, other than allotted lands, within the territory

of the Uintah and Ouray Reservation, subject to review by the Secretary of the Interior.

(*o*) To regulate the domestic relations of members of the Ute Indian Tribe of the Uintah and Ouray Reservation by ordinances which shall be subject to review by the Secretary of the Interior.

(*p*) To provide for the appointment of guardians for minors and mental incompetents by ordinances or resolutions which shall be subject to review by the Secretary of the Interior.

(*q*) To cultivate and preserve native arts, crafts, culture, and Indian ceremonials.

(*r*) To adopt resolutions to regulate the procedure of the Tribal Business Committee itself, and all other tribal agencies and tribal officials of the Uintah and Ouray Reservation.

(*s*) To delegate to subordinate organizations or to cooperative organizations which are open to all members of the Ute Indian Tribe of the Uintah and Ouray Reservation any of the foregoing powers, reserving the right to review any action taken by virtue of such delegated power.

Sec. 2. *Manner of review.*—Any resolution or ordinance which by the terms of this Constitution is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the Reservation who shall, within ten (10) days thereafter, approve or disapprove the same, and if such ordinance or resolution is approved, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within ninety (90) days from the date of enactment, rescind said ordinance or resolution for any cause, by notifying the Tribal Business Committee of such action; provided that if the Superintendent shall refuse to approve any resolution or ordinance submitted to him within ten (10) days

after its enactment, he shall advise the Tribal Business Committee of his reasons therefore, and the Committee, if such reasons appear to be insufficient may refer it together with the Superintendent's objections to the Secretary of the Interior, who may pass upon same and either approve or disapprove it within ninety (90) days from its enactment.

Sec. 3. *Future powers.*—The Tribal Business Committee may exercise such further powers as may in the future be delegated to them by the Secretary of the Interior, or by any other duly authorized official or agency of the Government.

Sec. 4. *Reserved powers.*—Any rights and powers heretofore vested in the Tribe or bands of the Uintah and Ouray Reservation but not expressly referred to in this Constitution shall not be abridged by this article, but may be exercised by the people of the Uintah and Ouray Reservation through the adoption of appropriate By-laws and constitutional amendments.

Article VII—Bill of Rights

Section 1. All members of the Ute Indian Tribe of the Uintah and Ouray Reservation over the age of twenty-one (21) years who have maintained legal residence on the Reservation for a period of one year immediately prior to any election shall have the right to vote in all tribal elections.

Sec. 2. All members of the Ute Indian Tribe of the Uintah and Ouray Reservation shall be accorded equal opportunities to participate in the economic resources and activities of the Reservation.

Sec. 3. All members of the Ute Indian Tribe of the Uintah and Ouray Reservation may enjoy, without hindrance, freedom of speech, worship, conscience, press, assembly and association.

Sec. 4. Any member of the Ute Indian Tribe of the Uintah and Ouray Reservation accused of any offense shall have the right to a prompt, open and public hearing, with due notice of the offense charged, and shall have the right to summon witnesses on his own behalf. Trial by jury may be demanded by any prisoner accused of any offense punishable by more than thirty (30) days imprisonment. Excessive bail shall not be required, and cruel punishment shall not be imposed.

* * * *

Article IX—Referendum

Upon a petition of at least one-third (⅓) of the eligible voters of the Ute Indian Tribe of the Uintah and Ouray Reservation, or upon the request of a majority of the members of the Tribal Business Committee, any enacted or proposed ordinance or resolution of the Tribal Business Committee shall be submitted to a popular referendum, and the vote of the majority of the qualified voters voting in such referendum shall be conclusive and binding on the Tribal Business Committee provided that at least thirty (30) per cent of the eligible voters shall vote in such election.

Article X—Amendments

Amendments to the Constitution and By-laws may be ratified and approved in the same manner as this Constitution and By-laws. Whenever the Tribal Business Committee shall, by an affirmative vote of four or more members, call for the submission of an amendment, the Secretary of the Interior shall call an election upon the proposed amendment. If at such election the amendment is adopted by a majority of the qualified voters of the Tribe voting thereon and if at least thirty (30) per cent of those entitled to vote shall vote in such election, such amendment shall be submitted to the Secretary of the Interior and if approved by him, shall thereupon take effect.

CERTIFICATE OF ADOPTION

Pursuant to an order, approved November 20, 1936, by the Secretary of the Interior, the attached Constitution and By-laws was submitted for ratification to the Ute Indians of the Uintah, Uncompahgre and Whiteriver Bands of the Uintah and Ouray Reservation and was on December 19, 1936, duly adopted by a vote of 347 for, and 12 against, in an election which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganization Act of June 18, 1934, (48 Stat. 984), as amended by the Act of June 15, 1935, (49 Stat. 378).

Roy Smith,
Chairman of Election Board.
Oran Curry,
Chairman of Tribal Business Committee.
Robert L. Bennett,
Secretary.

C. C. Wright,

Superintendent in charge of the Reservation.

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Constitution and By-laws of the Ute Indian Tribe, of the Uintah and Ouray Reservation.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and By-laws are hereby declared inapplicable with any of the provisions of the said Constitution and By-laws are hereby declared inapplicable to these Indians.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and By-laws.

Approval recommended: January 12, 1937.

WILLIAM ZIMMERMAN, JR.,

Acting Commissioner of Indian Affairs.

HAROLD L. ICKES,
Secretary of the Interior.

WASHINGTON, D.C., *January 19, 1937*

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH
CENTRAL DIVISON

Case No. CR93-308

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PERRY VON MURDOCK,
Defendant.

Salt Lake City, Utah
Date: August 21, 1996

REPORTER'S TRANSCRIPT

BEFORE: THE HONORABLE J. THOMAS GREENE

* * * *

[11] There are rather complicated legal matters and things that have a bearing on this case and we're, we've announced in a decision a lot of things that have non-criminal implications, and here we are in a criminal proceeding and because of that, among other reasons, I feel like a plea of nolo contendere is appropriate and that's why I'm doing it, I believe that's why Mr. Higgins has greed to recommend it to you and that's what the government is willing to do and that's what you're willing to do, is it?

THE DEFENDANT: Yes.

THE COURT: You feel like you understand the significance of that?

THE DEFENDANT: Yes, I do.

THE COURT: Okay. As part of this Plea Agreement or as part of the Statement in Advance of Plea there's a statement of facts. Have you gone over that with your lawyer?

THE DEFENDANT: Yes I have, I've gone over and signed it.

* * * *

[12] THE COURT: And in that connection let me just go over these facts with you. As I understand it you agree that these are the facts that apply, that October 2nd, 1993 you were hunting, took a elk while you were on the lands that are held in trust by the United States for the Ute Indian Tribe and you knew that you were on tribal lands, is a true?

THE DEFENDANT: Yes.

THE COURT: And you did not have a hunting permit as required by the Ute Tribe Big Game Proclamation and although you had applied for the permit the application was not given consideration due to the position of the Ute Indian Tribe that you were not qualified to participate in the hunt due to the fact that you are not an enrolled member of the tribe nor was your name included on the final rolls of the mixed blood terminating Utes published in the Federal Register 21, pages 2208 to 2220. That's true is it?

THE DEFENDANT: Yes.

THE COURT: And you—your parents were both included on that final role of the mixed blood Utes published in that, those pages of the Federal Register. You, defendant [13] Perry Von Murdock was not, you were not included on those roles because you were not born at the time, very good reason. That's so, is it?

THE DEFENDANT: Yeah.

THE COURT: And you were born in 1968. At the time of your birth, the defendant, Perry Von Murdock

and his parents were living on the Ute Indian Tribe's reservation and that's a fact, is it?

THE DEFENDANT: Yes.

THE COURT: The defendant, Perry Von Murdock had previously submitted a membership application to the Ute Indian Tribe. The tribe has not acted on that application, either positively or negatively but it appears that the tribe is unlikely to ever act on the application. That's the other fact that is agreed upon, is that true?

THE DEFENDANT: Yes.

THE COURT: Those are the facts that form the factual basis for the entry of a plea at this time and I find that there is a factual basis upon which this plea could be entered. Is there anything further?

MR. HOWELL: I don't believe so except for entry of plea.

THE COURT: Yes. Okay.

MR. HIGGINS: That's all.

* * * *

(2)

Supreme Court, U.S.
FILED
JUN 9 1998
CLERK

No. 97-1575

In the Supreme Court of the United States

OCTOBER TERM, 1997

PERRY VON MURDOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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25 pp

QUESTION PRESENTED

Whether petitioner was properly determined not to be a member of the Ute Indian Tribe, and thus to be subject to prosecution under 18 U.S.C. 1165 for hunting on tribal trust lands without lawful authority or permission.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1575

PERRY VON MURDOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 132 F.3d 534. The opinion of the district court (Pet. App. 17a-37a) is reported at 919 F. Supp. 1534.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1997. A petition for rehearing was denied on December 22, 1997. Pet. App. 38a. The petition for a writ of certiorari was filed on March 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted in the United States District Court for the District of Utah, upon a plea of nolo contendere, of hunting on Indian land without lawful authority or permission, in violation of 18 U.S.C. 1165. He was sentenced to 30 days' probation and a $200 fine. He challenged his conviction on appeal on the ground that he was an Indian with the inherent right to hunt on tribal lands. The United States Court of Appeals for the Tenth Circuit rejected that argument and affirmed the conviction.

1. In 1954, Congress adopted the Ute Partition and Termination Act (UTA), 25 U.S.C. 677 *et seq.*, as part of its policy, since abandoned, to terminate the trust relationship between the federal government and the Indian Tribes. See H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) ("it is the policy of Congress, as rapidly as possible * * * to end [the Indians'] status as wards of the United States"). The UTA reflected the policy choices of both Congress and the Ute Indian Tribe. "The [UTA] was the result of proposals initiated by the tribe itself. * * * The tribe also drafted the Act." *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 143 (1972) (citing H.R. Rep. No. 2493, 83d Cong., 2d Sess., 2 (1954) and S. Rep. No. 1632, 83d Cong., 2d Sess., 7 (1954)).

Instead of terminating federal supervision over an entire Tribe, as did many of the termination statutes,[1] the UTA terminated federal supervision only over the so-called "mixed-blood" members of the Ute Indian

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[1] The various termination statutes, enacted primarily between 1954 and 1956, are identified in *Affiliated Ute Citizens*, 406 U.S. at 133 n.1.

Tribe.[2] The "full-blood" members were to remain, at least for the time being, as a Tribe under federal supervision.[3] The Tribe proposed that approach, and Congress accepted it, because the mixed-blood Utes, as a group, believed that they were ready to assume full responsibility for their property, while the full-blood Utes did not. As explained in a letter from the Assistant Secretary of the Interior included in the House Report:

> The mixedblood group believes that its members are ready for a termination of Federal supervision over their property, and the fullblood group believes that its members are not ready. The Indians have therefore agreed to divide their tribal assets between the two groups, to propose a terminal program for the mixedblood group, and to propose a development program for the fullblood group that will accelerate the process of preparing them for a terminal program at a later date.

H.R. Rep. No. 83-2493, at 3; see *Ute Indian Tribe* v. *Probst*, 428 F.2d 491, 498 (10th Cir. 1970) (noting that "[t]he legislative history shows that the mixed-bloods desired termination of federal supervision").

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[2] The court of appeals recognized (Pet. App. 2a n.1), as did this Court in *Affiliated Ute Citizens*, 406 U.S. at 133 n.3, that the term "mixed-blood" may be considered offensive. Because the term is used in the UTA, however, the court of appeals used it for purposes of clarity. We do so as well.

[3] Although the UTA contemplated that federal supervision would eventually be terminated over the entire Ute Indian Tribe, no such termination has occurred or is anticipated, given that federal policy no longer favors termination. See *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 503 (1986).

In order to implement that approach, the UTA established a procedure for the creation of a tribal membership roll, which listed the full-blood and mixed-blood members of the Tribe.[4] 25 U.S.C. 677g. Once the roll had been completed and published in the Federal Register, the tribal assets were to be divided pro rata among the full-blood and mixed-blood Utes. 25 U.S.C. 677i.[5] The mixed-blood Utes would then be able to dispose of the assets that they received, initially subject to the approval of the Secretary of the Interior and thereafter without any federal supervision. 25 U.S.C. 677n, 677o. After the removal of federal restrictions on the property of each mixed-blood Ute, the Secretary was to "publish in the Federal Register a proclamation declaring that the Federal trust relationship to such individual is terminated." 25 U.S.C. 677v. The individual then would "not be entitled to any of the services per-

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[4] Under the Act, the "full-blood" members were those individuals with at least "one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half." 25 U.S.C. 677a(b). "Mixed-blood" members were those who either did not possess sufficient Indian or Ute Indian blood to qualify as "full-blood" members or who chose to be treated as "mixed-blood" members after having been initially classified as "full-blood" members. 25 U.S.C. 677a(c), 677c.

[5] The tribal assets subject to division among the 1,804 members included $20,702,885 in cash, accounts receivable, and land. H.R. Rep. No. 2493, *supra*, at 2. Those tribal assets that were not susceptible of "equitable and practicable distribution" —such as oil, gas, and mineral rights—would continue to be held in trust by the United States and would be jointly managed by the Tribal Business Committee and the mixed-blood group's representative, the Ute Distribution Corporation. 25 U.S.C. 677i, 677g. See *Affiliated Ute Citizens*, 406 U.S. at 133-139.

formed for Indians because of his status as an Indian," would not be subject to any "statutes of the United States which affect Indians because of their status as Indians," and would be subject to "the laws of the several States * * * in the same manner as they apply to other citizens within their jurisdiction." *Ibid.*

As originally enacted, Section 5 of the UTA provided that the Ute Indian Tribe "shall thereafter consist exclusively of full-blood members" and that "[m]ixed-blood members shall have no interest therein except as otherwise provided in this Act." UTA, Pub. L. No. 671, § 5, 68 Stat. 868 (codified as amended at 25 U.S.C. 677d). In 1955, the Solicitor of the Department of the Interior issued an opinion construing those provisions as superseding the Tribe's authority to define the criteria for membership. Dep't of Interior Solicitor's Opinion of Sept. 6, 1955 (*reprinted in* 2 Op. Sol. on Indian Affairs 1690 (1979)). Congress acted swiftly to reverse that interpretation and "to make it clear that the Ute Tribal Constitution governs membership, not the 1954 Act." *Chapoose* v. *Clark*, 607 F. Supp. 1027, 1030 (D. Utah 1985). Section 5 of the UTA was amended to provide that "[n]ew membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and ordinances enacted thereunder." Act of Aug. 2, 1956, Pub. L. No. 920, § 1, 70 Stat. 936 (codified at 25 U.S.C. 677d). In addition, Section 8 of the UTA was amended to clarify that "this Act shall not be construed as * * * preventing future membership in the tribe, after the date of enactment of this Act, in the manner provided in the

constitution and bylaws of the tribe." § 2 (codified at 25 U.S.C. 677g).[6]

The United States ended its supervision of the mixed-blood Utes and terminated its trust relationship with them on August 24, 1961. Ute Termination Proclamation, 26 Fed. Reg. 8042 (1961). See *Affiliated Ute Citizens*, 406 U.S. at 149-150 (noting that Ute Termination Proclamation effected "the termination of federal supervision over the trust and restricted property of the mixed-bloods").

2. Petitioner was born in 1968 to two mixed-blood Utes who lived on the Tribe's Uintah and Ouray Reservation. Petitioner's parents had been listed on the final roll of mixed-blood Utes published in the Federal Register on April 5, 1956,[7] and had subsequently received their respective shares of tribal property. The federal government's supervision of

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[6] From 1956 until 1983, the Secretary of the Interior took the position that the UTA, as amended in 1956, did not impose a particular blood-quantum requirement for tribal membership and that the Tribe had the authority to determine its own membership criteria. *Chapoose*, 607 F. Supp. at 1031. In 1983, however, the Secretary concluded that only "full-blood" Utes, as defined in the UTA, could be members of the Tribe, and therefore refused to approve a tribal ordinance that would have enrolled in the Tribe persons who did not meet the UTA criteria. *Chapoose*, 607 F. Supp. at 1028. The district court in the *Chapoose* case set aside the Secretary's disapproval of the ordinance and issued a declaratory judgment that the UTA does not abrogate the Tribe's power to control its own membership. *Id.* at 1037. The Secretary did not appeal that decision.

[7] According to the final mixed-blood roll, petitioner's father, Colin Murdock, had three-eighths Ute blood, and petitioner's mother, Laura Jane Hackford Murdock, had one-eighth Ute blood. 21 Fed. Reg. 2208, 2210 (1956).

petitioner's parents was formally ended in 1961 by the Termination Proclamation. Pet. App. 3a, 21a-22a, 68a.

The Tribe has never considered petitioner to be a member. At the time of petitioner's birth, the Tribal Constitution provided that membership in the Tribe extended only to "children born to any member of the Ute Indian Tribe of the Uintah and Ouray Reservation who is a resident of the Reservation at the time of the birth of said children." Pet. App. 57a, Ute Tribal Const., Art. II, § 1(b). As a result of the UTA, petitioner's parents had ceased to be members of the Tribe in 1956, and thus did not transmit membership to him under the Tribal Constitution. Pet. App. 3a-4a; see also Pet. 12 (acknowledging that petitioner's parents ceased to be members of the Tribe in 1956).

In 1979, petitioner applied for membership in the Tribe. Pet. 14; Pet. App. 69a. The Tribe never acted on his membership application, either favorably or unfavorably, and never placed his name on its membership roll. Pet. App. 69a.

In 1993, petitioner applied to the tribal Fish and Wildlife Department for a big game permit for the 1993 hunting season. At that time, the hunting of big game, such as elk, on tribal lands was regulated jointly by the Tribe and the mixed-blood Utes' representative, the Ute Distribution Corporation (UDC). Under the 1993/94 Ute Tribe/UDC Big Game Proclamation, only tribal members and "terminated Utes" (*i.e.*, persons listed on the final roll of mixed-blood Utes published in 1956) could obtain permits to hunt big game on tribal lands. Petitioner was neither. The Fish and Wildlife Department therefore did not consider his permit application. Pet. App. 4a, 21a-22a, 68a.

On October 2, 1993, a tribal conservation officer apprehended petitioner in possession of a five-point elk, which he had shot within the boundaries of the Uintah and Ouray Reservation on land that is held in trust by the United States for the Tribe. Petitioner had no tag, license, or permit to shoot the elk. He had taken the elk in an area that he knew to be on tribal lands within the Reservation. Pet. App. 4a, 68a.

3. Petitioner was charged in a one-count misdemeanor information with hunting on Indian land without lawful authority or permission, in violation of 18 U.S.C. 1165.[8] Pet. App. 22a. The United States moved for a determination of petitioner's Indian status and thus of his amenability to prosecution under Section 1165; petitioner moved to dismiss the information on the ground, *inter alia*, that he has an inherent right to hunt on tribal land notwithstanding the UTA.

The district court held that petitioner is not "a member of the Ute Indian Tribe under its Constitution and the requirements imposed by the Ute Tribe as to its membership." Pet. App. 27a. The

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[8] 18 U.S.C. 1165 provides:

> [w]hoever, without lawful authority or permission, willfully, and knowingly goes upon any land that belongs to any Indian or Indian tribe, band or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined under this title or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

court therefore concluded that petitioner was subject to prosecution under 18 U.S.C. 1165.[9]

The district court rejected petitioner's argument that he has a right to hunt on tribal lands "because he is a member or a descendant of persons who belonged to the Uintah Band of Ute Indians," one of three Bands that united in 1937 to form the Ute Indian Tribe of the Uintah and Ouray Reservation. Pet. App. 27a-30a. The court, like the government, agreed that no member of the Ute Tribe, whether full-blood or mixed-blood, lost the right to hunt or fish on tribal lands as a result of the UTA. *Id.* at 28a. The court nonetheless held that such rights were personal to the individual member and did not descend to children who were never members of the Tribe. *Id.* at 28a-29a.

The district court also rejected petitioner's constitutional challenges to the UTA. The court held that the UTA does not violate the equal protection component of the Fifth Amendment in treating full-blood Utes differently from mixed-blood Utes. Pet. App. 34a-35a. The court further held that the UTA does not violate petitioner's First Amendment right of association, noting that "the Ute Tribe has the right to set its own membership requirements" and thus to exclude petitioner. *Id.* at 36a & n.21.

On August 21, 1996, petitioner entered a conditional nolo contendere plea to the misdemeanor information pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. He reserved the right to appeal

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[9] The Ute Indian Tribe filed a brief *amicus curiae* in the district court supporting the government's position that petitioner is not a member of the Tribe and has no right to hunt on tribal lands.

any issues previously decided by the district court. Pet. App. 67a-69a.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-17a.

The court of appeals rejected petitioner's claim that "he is a member of the [Ute] Tribe and therefore has an inherent right to hunt, and fish on the reservation." Pet. App. 4a. The court determined that petitioner "has never been a member" of the Tribe, and "is not eligible for membership under either the requirements [of the Tribal Constitution] in effect at his birth or as amended." *Ibid.* The court explained that "[b]ecause [petitioner's] parents were not members of the Tribe at the time of his birth, he did not become a member pursuant to the Ute Tribal Constitution in effect at the time." *Id.* at 12a. Nor had petitioner "subsequently met the Tribe's requirements for membership"—requirements that the Tribe has a "sovereign right" to establish. *Ibid.*

The court of appeals concluded that the Ninth Circuit's decisions in *Kimball* v. *Callahan*, 493 F.2d 564, cert. denied, 419 U.S. 1019 (1974), and *Kimball* v. *Callahan*, 590 F.2d 768, cert. denied, 444 U.S. 826 (1979), did not support petitioner's claim of a right to hunt on tribal lands. Pet. App. 6a-11a. Those cases held, among other things, that descendants of individuals who had withdrawn from the Klamath Tribe for purposes of the Klamath Termination Act retained the right to hunt and fish on tribal lands. The court distinguished those cases as "resting on the fact" that the descendants possessed the hunting and fishing rights "*through their own continued membership in the Klamath Tribe*," not through the previous membership of their forbearers. Pet. App.

11a. Petitioner, in contrast, was never a member of the Ute Indian Tribe.[10]

Second, the court of appeals held that the UTA's distinctions between mixed-blood Utes and full-blood Utes do not violate the equal protection component of the Fifth Amendment. Pet. App. 15a-16a. The court, relying on *United States* v. *Antelope*, 430 U.S. 641, 645 (1977), recognized that federal legislation with respect to Indian Tribes "is not based upon impermissible racial classifications" and thus is not subject to strict scrutiny. Pet. App. 15a. The court concluded that Congress had a rational basis for treating the mixed-blood Utes and the full-blood Utes differently in pursuing its goal of ending federal supervision over the Indian Tribes: Congress determined that the two groups were not "similarly situated with respect to their ability to manage their own affairs," because the mixed-blood Utes "were approaching the point at which federal supervision over them could be ended," while the full-blood Utes were not. *Ibid.*

Finally, the court of appeals rejected petitioner's arguments that the UTA violates his First Amendment rights and those of the Ute Indian Tribe. Pet. App. 16a. As for petitioner's contention that the UTA "prevents him from expressing his own First Amendment right to identify with the Tribe," the court

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[10] In addition, the court of appeals held that petitioner had no fishing or hunting rights as a descendant of members of the Uintah Band as distinct from the Ute Tribe. Pet. App. 14a. The court explained that the Uintah Band "ceased to exist separately outside the Ute Tribe" in 1937, when the Uintah Band joined with the Whiteriver Band and the Uncompahgre Band to form the Ute Indian Tribe of the Uintah and Ouray Reservation. *Id.* at 13a-14a.

explained that petitioner was prevented from participating in tribal affairs *not* by the UTA but by "the Tribal Constitution's definition of those who may be Tribal members." *Ibid.* The court noted that the UTA "did no more than allow the Tribe to establish its own criteria for membership, under which [petitioner] is not a member of the Tribe." *Ibid.* As for petitioner's contention that the UTA "interfered with the internal affairs of the Tribe and altered its philosophical cast," the court concluded that petitioner does not have standing to assert an infringement of the Tribe's First Amendment rights. *Ibid.*

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of this Court or any other court of appeals, and does not present any issue of recurring significance. This Court's review therefore is not warranted.

1. The petition rests on the erroneous premise that it is the Ute Partition and Termination Act (UTA), 25 U.S.C. 677 *et seq.*, alone that bars petitioner from membership in the Ute Indian Tribe and from the right to hunt on tribal lands within the Uintah and Ouray Reservation. See, *e.g.*, Pet. 21 (asserting that the UTA "is the only barrier between [petitioner] and full citizenship" in the Tribe). But the UTA addresses only the criteria for membership in the Tribe as of April 5, 1956, the date of publication in the Federal Register of the final membership rolls of full-blood and mixed-blood Utes. 25 U.S.C. 677d. The UTA expressly provides that "[n]ew membership in the tribe shall thereafter be controlled and determined by the constitution and bylaws of the tribe and

ordinances enacted thereunder." *Ibid.*; see also 25 U.S.C. 677g (the UTA is not to be construed "as preventing future membership in the tribe * * * in the manner provided in the constitution and bylaws of the tribe").

By the time that petitioner was born in 1968, the Ute Indian Tribe, not the UTA, governed whether he was entitled to tribal membership. The Tribe was not barred by the UTA from extending membership to petitioner—or, for that matter, from restoring membership to his parents—through its own Constitution, bylaws, and ordinances. But the Tribe did not do so.[11] Petitioner is thus aggrieved not by the UTA, but by the Tribe's own regulations regarding membership, which are not at issue here.

Accordingly, even if the Court were to accept petitioner's arguments with regard to the construction or the constitutionality of the UTA, petitioner would not automatically be entitled to membership in the Tribe. As this Court has recognized, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978). Indeed, petitioner concedes (Pet. 25) that Indian Tribes enjoy "the same autonomy and self-government concerning membership that we enjoy in our own social clubs, organizations, and even religions,"

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[11] To the contrary, in 1958, the Tribe further restricted the criteria for tribal membership, requiring new members of the Tribe to have five-eighths, rather than the previous one-half, Ute blood. *Chapoose* v. *Clark*, 607 F. Supp. 1027, 1031 (D. Utah. 1985).

and thus cannot be judicially compelled to admit an individual to membership.[12]

In short, petitioner's arguments about the construction and the constitutionality of the UTA have little, if any, bearing on the validity of his conviction because the UTA does not control whether petitioner is entitled to membership in the Tribe. This Court ordinarily does not grant certiorari to consider such essentially "academic" issues. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

2. Petitioner asserts (Pet. 14-15) that the court of appeals' decision "disregards the teachings from this Court" in *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), and "conflicts" with the holdings of the Ninth Circuit in *Kimball* v. *Callahan*, 493 F.2d 564, cert. denied, 419 U.S. 1019 (1974) (*Kimball I*), and *Kimball* v. *Callahan*, 590 F.2d 768, cert. denied, 444 U.S. 826 (1979) (*Kimball II*). That is not so. The court of appeals correctly recognized that its decision

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[12] Moreover, even members of the Ute Indian Tribe cannot hunt big game on trust lands within the Reservation without a permit, which petitioner did not obtain before committing the acts in October 1993 that gave rise to his conviction. Pet. App. 4a, 68a. Hence, even if petitioner could obtain a judicial declaration that he was a member of the Tribe as of October 1993, he could still be subject to prosecution by the Tribe (even if not by the United States, see 18 U.S.C. 1152) for hunting without a permit on tribal lands. See 1993/94 Ute Tribe/UDC Big Game Proclamation G1a, 2 (attached as Exhibit B to Brief of Ute Indian Tribe as *Amicus Curiae* in district court) ("any person" who "engage[s] in hunting without first obtaining the proper permit and tag" on Ute tribal lands "shall be subject to criminal prosecution in a court of competent jurisdiction and shall [be] subject to civil penalties, as provided by the Ute Law and Order Code").

is consistent with *Menominee Tribe* and the *Kimball* cases. See Pet. App. 5a-11a.

In *Menominee Tribe*, the Court held only that the Menominee Indian Termination Act did not extinguish *sub silentio* the Tribe's right to hunt and fish on the lands that it had received under an 1854 treaty. 391 U.S. at 411-413. The Tenth Circuit has recognized, in accordance with *Menominee Tribe*, that the UTA likewise did not extinguish the hunting and fishing rights of members of the Ute Indian Tribe, including the mixed-blood Utes, such as petitioner's parents, who ceased to be members of the Tribe under the UTA. *United States* v. *Felter*, 752 F.2d 1505, 1509-1512 (10th Cir. 1985); see also Pet. App. 9a (discussing *Felter*). *Menominee Tribe* does not address any issue concerning the hunting and fishing rights of individuals, such as petitioner, whom a Tribe has never included on its membership roll.

In the *Kimball* cases, the Ninth Circuit held that individuals who had withdrawn from the Klamath Tribe pursuant to the Klamath Termination Act, and consequently had their interest in tribal property converted into money and paid to them, retained a treaty right to hunt and fish on lands that had been part of the Tribe's reservation. *Kimball I*, 493 F.2d at 568-569; *Kimball II*, 590 F.2d at 772-775. That aspect of the Ninth Circuit's *Kimball* decisions is consistent with the Tenth Circuit's decision in *Felter* as discussed above. The Ninth Circuit additionally held in *Kimball II* that the descendants of those who had withdrawn from the Tribe possessed a right to hunt and fish on those lands. 590 F.2d at 775-776. The Ninth Circuit explained, in its relatively cursory treatment of the issue, that the Klamath Termination Act "did not affect the power of the Tribe to take any

action under its constitution and bylaws consistent with the Act," including the Tribe's powers to "establish[] criteria for membership in the Tribe" and to regulate the exercise of tribal hunting and fishing rights. *Id.* at 776. As the Tenth Circuit recognized (Pet. App. 11a), therefore, the Ninth Circuit's holding appears to rest on the fact that the Klamath Tribe itself considered the descendants to be members who had a right to hunt and fish on tribal lands. The Ute Indian Tribe, in contrast, does not consider petitioner to be a member of the Tribe. In view of that crucial factual difference between the present case and *Kimball II*, no square conflict can be said to exist between the Ninth and Tenth Circuits on any issue presented here.

In any event, even if any conflict did exist between the two cases, it would not be significant enough to warrant the Court's review. As petitioner concedes (Pet. 9-10), the tribal termination statutes of the 1950s are "now largely repealed," and the "few" that remain involve Tribes in the Ninth and Tenth Circuits. Even the Klamath Termination Act at issue in the *Kimball* cases was repealed in 1986. See Act of Aug. 27, 1986, Pub. L. No. 99-398, § 2, 100 Stat. 849 (codified at 25 U.S.C. 566). It thus appears unlikely that the "conflict" alleged by petitioner could deepen in the future.

3. Petitioner next contends (Pet. 20-26) that the UTA violates the First Amendment by infringing upon his right to associate with the Ute Indian Tribe or, alternatively, the right of the Tribe, as it existed before the UTA, to associate with all of its members, full-blood and mixed-blood Utes alike. Petitioner's position is without merit and is unsupported by any relevant authority.

The UTA does not prevent anyone—including the Tribe, its present or former members, or their descendants—from associating with anyone else. As noted above, the UTA merely specifies the criteria for tribal membership as of April 5, 1956, when the final rolls of full-blood and mixed-blood Utes were published in the Federal Register. 25 U.S.C. 677d. The UTA expressly authorizes the Tribe itself, through its Constitution, bylaws, and ordinances, thereafter to "control[] and determin[e]" the criteria for membership. The Tribe's authority to do so, independently of the UTA, has since been judicially recognized. See *Chapoose* v. *Clark*, 607 F. Supp. 1027, 1034 (D. Utah. 1985) ("Nowhere is there any indication that Congress intended [in the UTA] to take away the Tribe's right to determine its own membership."). It is the Tribe's own Constitution, bylaws, and ordinances, and not the UTA, that have prevented petitioner and others from associating with the Tribe as members.[13]

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[13] This case would not be an appropriate vehicle, moreover, to address whether the UTA violates the Tribe's associational rights. As the court of appeals recognized (Pet. App. 16a), petitioner's standing to assert the First Amendment rights of the Tribe is dubious, at best. Petitioner has never been a member of the Tribe. Although the Court has sometimes allowed a criminal defendant to assert the constitutional rights of a third party, see *Powers* v. *Ohio*, 499 U.S. 400 (1991), the Court has required, *inter alia*, that the criminal defendant have suffered an "injury in fact" that is traceable to the asserted violation of the third party's rights. *Id.* at 410-411; *Singleton* v. *Wulff*, 428 U.S. 106, 112-113 (1976). As explained in the text, petitioner's injury flows not from the UTA, but from the Tribe's own decision not to admit him to membership or to permit him to hunt on tribal lands. Nor does there exist the sort of "hindrance to the third party's ability to protect his or her own in-

4. Petitioner further asserts (Pet. 26) that the UTA is "[r]acially discriminatory legislation" in violation of the equal protection component of the Fifth Amendment. This Court has recognized, however, that Congress does not engage in invidious racial discrimination by singling out tribal Indians for distinctive treatment. See, *e.g.*, *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."); *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976) (per curiam); *Morton* v. *Mancari*, 417 U.S. 535, 552 (1974).

Petitioner argues (Pet. 26), without citation to any supporting authority, that those principles should not apply in this case because the UTA distinguishes among individual members of the Tribe based on the amount of Indian blood that they possess. But such distinctions are a necessary, and permissible, incident of Congress's providing special treatment to Indians. See *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 (E.D. Wash. 1965) ("[I]t seems obvious that whenever Congress deals with Indians and defines what constitutes Indians or members of Indian tribes, it must necessarily do so by reference to Indian blood."), aff'd, 384 U.S. 209 (1966).

The UTA, moreover, simply adopted distinctions based on Indian blood that had already been drawn by the Tribe itself.[14] And the UTA expressly authorized

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terests," *Powers*, 499 U.S. at 411, that would permit petitioner to assert the Tribe's associational rights.

[14] See H.R. Rep. No. 2493, *supra*, at 2 ("The Ute Tribe, of the Uintah and Ouray Reservation in Utah, consists of two

the Tribe, after 1956, to adopt different criteria, if it so chose, to define tribal membership. It is thus the Tribe's own definition of membership, which petitioner does not challenge here, that has caused him to be treated differently from full-blood Utes. It is not the UTA.

5. Finally, petitioner contends (Pet. 27-28) that the court of appeals' decision abrogates the rights to hunt and fish on tribal lands that once belonged exclusively to the Uintah Band, of which his ancestors were members, under an Executive Order issued in 1861 and confirmed by Congress in 1864. See Act of May 5, 1864, ch. 77, 13 Stat. 63. The court of appeals concluded, based on the text of the Tribal Constitution, that the Uintah Band ceased to have any distinct hunting and fishing rights after 1937, when the Uintah, Whiteriver, and Uncompahgre Bands united to form the Ute Tribe. Pet. App. 13a-14a. The court of appeals' analysis of the Tribal Constitution presents no issue of recurring significance that warrants this Court's review.

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distinct groups—the fullblood group and the mixed-blood group."); *id.* at 3 (Assistant Secretary of the Interior notes that the UTA adopted the definitions of full-blood and mixed-blood "[a]s used by this tribe"); see also *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 143 (1972) ("The [UTA] was the result of proposals initiated by the tribe itself. * * * The tribe also drafted the Act.") (internal citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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